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No. 92-1820

In The

Supreme Court of the United States

October Term, 1992

JACK J. GRYNBERG,

Petitioner,

vs.

CITY OF NORTHGLENN, COLORADO,

Respondent.

Petition For Writ Of Certiorari To The Colorado Supreme Court

PETITION FOR WRIT OF CERTIORARI

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May 14, 1993

QUESTION PRESENTED FOR REVIEW

1. Whether Petitioner Jack J. Grynberg's right to just compensation under Amendments V and XIV of the United States Constitution was denied when the Colorado Supreme Court dismissed a jury verdict in favor of Grynberg and ruled that the City of Northglenn's a) unauthorized exploration and prospecting on Grynberg's coal lease, b) its unlawful acquisition and dissemination of confidential and proprietary geophysical information about Grynberg's leasehold, and c) its preclusion of Grynberg's ability to mine his coal lease, did not constitute a taking of his property rights?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

PARTIES TO THE PROCEEDING BEFORE THE SUPREME COURT, STATE OF COLORADO vi

REFERENCE TO THE OFFICIAL OPINIONS DELIVERED IN THIS CASE BY OTHER COURTS 2

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED 2

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE 3

STATEMENT OF THE CASE 3

THE STAGE IN THE PROCEEDINGS IN WHICH THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED 11

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THIS WRIT 14

CONCLUSION 21

TABLE OF AUTHORITIES

Cases:

Air Pollution Variance Board v.
Western Alfalfa Corp.,
191 Colo. 455, 553 P.2d 811 (1976) 14

Buchanan v. Warley,
245 U.S. 60 (1917) 15

City of Northglenn v. Grynberg,
846 P.2d 175 (Colo. 1993) . . . . . passim

Gladin v. von Engeln,
195 Colo. 88, 575 P.2d 418 (Colo. 1978) 19

Grynberg v. City of Northglenn,
703 P.2d 601 (Colo. App. 1985) 2, 6

Grynberg v. City of Northglenn,
739 P.2d 230 (Colo. 1987) 6, 7, 16, 18

Grynberg v. City of Northglenn,
829 P.2d 473 (Colo. App. 1991) . . . . . passim

Hendler v. United States,
952 F.2d 1364 (Fed. Cir. 1991) 15

Kaiser Aetna v. United States,
444 U.S. 164 (1979) 15

Kirby Forest Indus. v. United States,
467 U.S. 1 (1984) 14

Layne v. Louisiana Co.,
209 La. 1014, 26 So.2d 20 (1946) 16, 19

Lucas v. South Carolina Costal Council,
___ U.S. ___, 112 S.Ct. 2886,
120 L.Ed.2d 798 (1992) 10, 14, 15, 20

Pennsylvania Coal Company v. Mahon,
393 U.S. 415 (1922) 15, 16, 19, 20

Ruckelshaus v. Monsanto Co.,
467 U.S. 986, 104 S.Ct. 2862,
81 L.Ed.2d 815 (1984) 11

Whitney Benefits Inc., et al.
v. United States, 18 Cl. Ct. 394 (1989),
aff'd, 926 F.2d 1169 (Fed. Cir. 1991) 15

Constitution:

United States Constitution
Amendment V . . . . . passim

United States Constitution
Amendment XIV . . . . . passim

Colorado Constitution,
Article II Section 15 12

Colorado Constitution
Article II, Section 25 . . . . . 12, 13

Statutes:

28 U.S.C. §1257 2

Colo. Rev. Stat. §24-10-101 7

Colo. Rev. Stat. §38-1-101 8

Colo. Rev. Stat. § 38-1-102 8

Colo. Rev. Stat. §38-1-106 8

Colo. Rev. Stat. §38-35-109 5

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Petition For Writ of Certiorari To The Colorado Supreme Court

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a Writ of Certiorari be issued to review the judgment and opinion of the Colorado Supreme Court in this case.

REFERENCE TO THE OFFICIAL OPINIONS DELIVERED IN THIS CASE BY OTHER COURTS

1. Grynberg v. City of Northglenn, 703 P.2d 601 (Colo. App. 1985)

2. Grynberg v. City of Northglenn, 739 P.2d 230 (Colo. 1987)

3. Grynberg v. City of Northglenn, 829 P.2d 473 (Colo. App. 1991)

4. City of Northglenn v. Grynberg, 846 P.2d 175 (Colo. 1993).

STATEMENT OF THE GROUNDS ON WHICH JURISDICTIN OF THIS COURT IS INVOKED

1. Review is sought of the decision of the Supreme Court of the State of Colorado, dated February 16, 1993. City of Northglenn v. Grynberg, 846 P.2d 175 (Colo. 1993).

2. No rehearing was sought by Petitioner from the Colorado Supreme Court nor has any extension of time for which to file this Petition for Writ of Certiorari been sought.

3. The statutory provision believed to confer on this Court jurisdiction to review the judgment of the Colorado Supreme Court by Writ of Certiorari is 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

Amendment V, United States Constitution. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (emphasis supplied).

Amendment XIV, Section 1, United States Constitution. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Nature of the Case

This is an inverse condemnation case brought by Petitioner Jack J. Grynberg ("Grynberg") against the City of Northglenn, Colorado (sometimes "City" or "Northglenn") for just compensation arising out of a taking of Grynberg's coal leasehold rights. The

Colorado Court of Appeals affirmed a freeholder jury verdict of $646,930 in favor of Grynberg, which was based upon Northglenn's taking of Grynberg's real property rights. The Colorado Supreme Court issued a Writ of Certiorari on April 27, 1992, to review the decision of the Colorado Court of Appeals.[1] The Colorado Supreme Court reversed the jury verdict and the decision of the Colorado Court of Appeals which affirmed the jury verdict, and dismissed the case. 846 P.2d at 185. It ruled, in essence, that Grynberg was not entitled to just compensation because Northglenn had not taken Grynberg's property. From that erroneous ruling, Grynberg brings this Petition for Writ of Certiorari.

2. The Course of Proceedings

This case has a long history, including four decisions by the Colorado appellate courts and two by different trial courts. In 1980 Grynberg brought suit against the City of Northglenn, Colorado and several of its agents. Grynberg was the owner of a lease issued by the State of Colorado, which gave him the exclusive right to explore, prospect and mine coal underlying Section 36, Township 1 North, Range 68 West of the 6th P.M., Weld County, Colorado.

Northglenn chose a portion of the surface of Grynberg's coal lease as a site for its municipal wastewater reservoir. In order to determine the suitability of the location, Northglenn engaged drilling contractors who, under Northglenn's direction, entered on the land overlying Grynberg's lease and conducted exploratory drilling

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[1]This decision of the Colorado Court of Appeals, the second by that court, is cited as Grynberg v. City of Northglenn, 829 P.2d 473 (Colo. App. 1991).

operations without Grynberg's consent. The express purpose of these actions was to discover the extent and quality of the mineral reserves underlying the reservoir site, because Colorado law prohibited permanent improvements over commercial mineral deposits. Based upon this exploration, Northgelnn had its agents prepare a report that erroneously stated that there were no commercial coal deposits on Grynberg's lease, and filed the report with the Colorado State Engineer. Northglenn then purchased the surface overlying Grynberg's lease and began planning and construction of its reservoir.

Grynberg immediately complained (to no avail) about the adverse impact of Northglenn's exploratory work, its publication of a report which stated that his coal reserves were worthless, and about the fact that, by designating the surface overlying his lease as a reservoir site, Northglenn had precluded Grynberg from mining his coal lease. When Northglenn refused either to cease its operations or to compensate Grynberg for the loss he had sustained, Grynberg filed suit in Colorado state court. In his complaint, Grynberg asserted five claims for relief: trespass, assumpsit, wrongful appropriation and inverse condemnation, interference with prospective business advantage and negligence.

In 1983, Northglenn and the other defendants in the case filed a motion for summary judgment, urging that all of Grynberg's claims, including his inverse condemnation claim, were barred under the Colorado Recording Statute (§38-35-109, 16A C.R.S. (1982)) because Grynberg did not record his lease in the county records. The Denver District Court granted Northglenn's motion for summary judgment on the basis that Grynberg's claims were all barred by his failure to record his coal lease. Id.

By decision dated January 24, 1985, the Colorado Court of Appeals affirmed the district court's dismissal of all of Grynberg's claims. Grynberg v. City of Northglenn, 703 P.2d 601 (Colo. App. 1985).

On July 8, 1985, the Colorado Supreme Court granted Grynberg's Petition for Writ of Certiorari, reversed the decision of the Colorado Court of Appeals, and remanded the case for further proceedings. Grynberg v. City of Northglenn, 739 P.2d 230 (Colo. 1987) (sometimes referred to as "Grynberg I"). In Grynberg I, the Colorado Supreme Court considered whether Northglenn's unauthorized drilling on and exploration of Grynberg's leasehold estate violated Grynberg's property rights. The Colorado Supreme Court held (unanimously and unequivocally) that it did and ruled that:

> The right to conduct exploration of the mineral estate is a property right which belongs exclusively to the mineral owner and is "based upon the central importance of information concerning mineral deposits to the value of the mineral estate,"

739 P.2d at 235.

> Northglenn's unauthorized exploration of the coal mineral estate violated Grynberg's property rights;

Id.

> Information regarding the geophysical properties of the mineral estate is a property right which belongs

> exclusively to the mineral owner. If that information is unlawfully obtained by others, the mineral owner is entitled to recover compensatory damages for disregard of his property rights;

739 P.2d at 237.

> Nothing in the statutes of Colorado or in the requirements relating to the permitting or construction of reservoirs, gave Northglenn the right to conduct tests and gather information concerning the existence and extent of commercial mineral deposits without Grynberg's consent.

739 P.2d at 236.

The Colorado Supreme Court concluded that Grynberg's claims for relief were not barred by the Colorado Recording Statute and directed the trial court to consider each claim for relief which Grynberg had asserted. The case was remanded to the Denver District Court in July, 1987. Grynberg v. City of Northglenn, 739 P.2d at 239.

In November, 1987, all of the defendants filed motions for summary judgment, asking that Grynberg's complaint be dismissed against Northglenn and all of the other defendants (i.e., Northglenn's agents)[2] pursuant to the Colorado Governmental Immunity Act, §§24-10-101, et seq., 10A C.R.S. (1988). The Denver District Court

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[2]The other original defendants included the engineering and drilling companies who performed exploratory work at Northglenn's request.

granted Northglenn's and the other defendants' motions for summary judgment and dismissed all of Grynberg's tort claims, holding that, "[T]he general rule of governmental immunity pertains with the result that the City is immune from the common law claims asserted by [Grynberg] and dismissal is required." However, the Denver District Court found that Grynberg's claim for inverse condemnation against the City of Northglenn was not barred by sovereign immunity, because immunity cannot bar an action based upon the violation of a constitutional right. Id.

The Denver District Court transferred the case to the District Court for Weld County on October 27, 1988, because inverse condemnation cases must be tried in the county where the real property is located. §38-1-101, 102 and 106, et seq., 16A C.R.S. (1982 Cum. Supp.).

The trial court in Weld County ruled that Northglenn had taken Grynberg's property rights by conducting unauthorized exploratory drilling, by publishing a report on the geophysical content of Grynberg's mineral estate, and by designating and acquiring the surface for its wastewater reservoir. Trial of Grynberg's inverse condemnation claim commenced in Weld County District Court on November 1, 1989. The evidence at trial showed that the portion of Grynberg's leasehold which contained the most coal lay directly under the site which the City had obtained for its wastewater reservoir, and that, under applicable regulations and safety considerations, these actions precluded Grynberg from mining the coal. Grynberg v. City of Northglenn, 829 P.2d 473, 476 (Colo. App. 1991). The evidence also proved that Northglenn's unauthorized drilling and geophysical exploration on Grynberg's coal lease, as well as its unauthorized

publication of an erroneous report respecting his mineral estate, destroyed the value of Grynberg's property rights. Id.

The Colorado Court of Appeals summarized the evidence in this case as follows:

> The jury heard several experts testify as to the value of the mineral estate in 1978. All agreed that the coal market was at its peak at that time. Plaintiff and another mining and engineering expert opined that the coal in this area averaged 9500 to 9700 BTU, that the bulk of the area was commercial and had six feet or more coal, and that analysis of the recoverability of resources prior to drilling for the [Northglenn] report indicated a presence of 4.4 million tons of coal, which made this area an excellent potential coal source in 1978. This expert also testified that the value of plaintiff's interest was negatively impacted because of the prohibition of mining under a reservoir embankment, safety concerns inherent in mining under a reservoir itself, and the publication of the erroneous [Northglenn] data. As such, he opined that plaintiff's mineral rights under the coal lease would no longer yield a willing buyer.
>
> The mining consultant testified that 9700 BTU coal would yield $16.97/ton in 1977 and 1978. Given the presence of 4.4 million tons of coal, this expert's personal appraisal of the value of the exploration rights to plaintiff's property was $500,000 to $750,000. He opined that a willing buyer would

> have paid approximately $4.3 million for plaintiff's property prior to the taking and damage by the City.
>
> Finally, plaintiff presented testimony from a "landman" experienced in negotiating the sale of coal rights in the Boulder/Weld coal field in 1977. He testified that the sale of a comparable property with 4.4 million tons coal at 8000 BTU sold, at that time, for $800,000.
>
> Thus, plaintiff presented evidence as to the value of his coal reserves in 1977 and 1978 prior to the City's activities and showed what a willing purchaser would have paid for the property at the time it was damaged. This is a proper measure of damages.

Id. at 476. On November 13, 1989, the freeholder jury in Weld County returned a verdict and awarded Grynberg just compensation in the amount of $646,930 for Northglenn's taking and damaging of his property rights. On November 13, 1989, judgment was entered on the jury verdict in favor of Grynberg for $646,930, plus costs, prejudgment interest and attorneys' fees.

In its second opinion in this case, the Colorado Supreme Court initially recognized that a taking occurs when "an entity clothed with the power of eminent domain substantially deprives a property owner of the use and enjoyment of that property." City of Northglenn v. Grynberg, 846 P.2d at 178, citing Lucas v. South Carolina Costal Council, ___ U.S. ___, ___, 112 S.Ct. 2886, 2895, 120 L.Ed.2d 798 (1992). However, it nonetheless reversed the decision by the Colorado Court of Appeals, overturned the jury

verdict, and dismissed the case in its entirety. The Colorado Supreme Court rejected the factual findings of the jury (confirmed by the Colorado Court of Appeals' review of the record), to the effect that Grynberg's property rights had been taken when Northglenn acquired the surface overlying Grynberg's coal estate and precluded his ability to mine his coal lease. 846 P.2d at 180-181. Although the Colorado Supreme Court recognized that Northglenn had engaged in unauthorized drilling and exploration which were contrary to the property rights which belonged exclusively to Grynberg, it ruled that Northglenn's exploratory work did not interfere with Grynberg's "use, possession, enjoyment, or disposition of his coal lease." Id. at 182. The Colorado Supreme Court also reasoned that Grynberg's geophysical rights were not "trade secrets" entitled to protection under the Fifth Amendment's takings clause. Id. at 183, citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984). The Colorado Supreme Court disagreed with the jury and the Colorado Court of Appeals, and ruled that Northglenn's publication of proprietary information regarding the mineral content of Grynberg's coal lease was not a taking because this was not proprietary information which belonged to Grynberg. Id. at 184.

THE STAGE IN THE PROCEEDINGS IN WHICH THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED

Petitioner Grynberg seeks review of the ruling of the Colorado Supreme Court because it violates Amendments V and XIV of the United States Constitution. Grynberg identified this Constitutional basis for his just compensation claim at the following stages before the trial court and the appellate courts:

1. **Second Amended Complaint (Revised).**

1. This is an action for damages, based upon defendants' intentional trespass, assumpsit, wrongful appropriation of proprietary geophysical and geological information pertaining to plaintiff's mineral leasehold in violation of the Colorado and U.S. Constitutions. . .

29. Defendants, through their unauthorized appropriation of plaintiff's right to obtain the information concerning the coal deposits and commercial nature of plaintiff's leasehold estate, and their publication of this information, committed a wrongful taking or damaging of plaintiff's exclusive, proprietary right to obtain such information without compensation and without due process of law, in violation of Sections 15 and 25 of Article II of the Colorado Constitution, and further in violation of Amendment XIV of the United States Constitution as a taking of private property without due process of law.

2. **Plaintiff's Memorandum Brief in Support of Cross-Motion for Summary Judgment Against All Defendants on Liability Only and in Opposition to Defendants' Motion for Summary Judgment** (p. 26).

Denial of plaintiff's claim for inverse condemnation, coupled with a ruling that the City is immune from

suit for its tortious conduct, would be an unconstitutional deprivation of plaintiff's right to due process and just compensation. See Colorado Constitution Article II, Section 25; U.S. Constitution Amendment V.

3. **Plaintiff's Response to Northglenn's Motion for Partial Summary Judgment** (p. 4).

Northglenn's Motion must be denied for a number of reasons. First, and foremost, it asks this Court to do nothing less than ignore the Colorado and United States Constitutions, and reverse the long-standing law of damages established by the Colorado courts for cases involving inverse condemnation.

4. **Plaintiff's Trial Data Certificate** (May 5, 1989), sections B.9. at p.7, and B.10. at p.16, citing, as authority in support of Grynberg's claims, Amendment XIV to the United States Constitution.

5. **Supplement to Plaintiff's Trial Data Certificate** (May 17, 1989), section B.9., citing Amendments V and XIV to the United States Constitution as authority in support of Grynberg's claims. See also, Plaintiff's Second Amended Trial Data Certificate (September 15, 1989) at section B.9., p.7, and p.20, citing Amendments V and XIV to the United States Constitution.

6. **Notice of Cross-Appeal** (Colorado Court of Appeals) (p.1).

> This is a case brought by plaintiff Jack J. Grynberg ("Grynberg") to recover just compensation from the City of Northglenn ("Northglenn") for its wrongful taking and damaging of Grynberg's valuable mineral estate . . .

7. **Grynberg's Petition for Certiorari (Colorado Supreme Court)** (p.6)

> The Fifth Amendment of the Constitution of the United States also requires the payment of just compensation. Citing Kirby Forest Indus. v. United States, 467 U.S. 1 (1984).[3]

9. **Opening Brief of Cross-Petitioner Jack J. Grynberg (Colorado Supreme Court)**, pp. 18, 38 and 40, citing Amendments V and XIV to the United States Constitution.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THIS WRIT

The decision of the Colorado Supreme Court is a decision on an important question of federal law which has not been addressed since this Court's decision in Lucas v. South Carolina Coastal Council, supra. This case involves important issues pertaining to

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[3]The Colorado Supreme Court has recognized that the United States Constitution provides the minimum protection which must be observed by the laws of the State of Colorado. See Air Pollution Variance Board v. Western Alfalfa Corp., 191 Colo. 455, 553 P.2d 811, 816 (1976).

takings of mineral rights. While Lucas involved a situation where there had been a regulatory taking of substantially all of the plaintiff's property rights, this case involves a physical taking of substantially all of the rights and economic use of Grynberg's mineral rights. The effect of the ruling of the Colorado Supreme Court creates a clear conflict with and departure from applicable decisions of this Court. Lucas v. South Carolina Coastal Council; Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); Pennsylvania Coal Co. v. Mahon, 393 U.S. 415 (1922). The Colorado Supreme Court's decision is also at odds with other federal case authorities. Whitney Benefits Inc., et al. v. United States, 18 Cl. Ct. 394 (1989), aff'd. 926 F.2d 1169 (Fed. Cir. 1991); Hendler v. United States, 952 F.2d 1364, 1374 (Fed. Cir. 1991), because it permits a municipality to destroy Grynberg's property rights for a public purpose, without requiring a single penny of compensation to the owner. A second reason relied upon for the granting of this Petition is that this case will allow the Court to analyze Lucas and other relevant decisions in the context of mineral leasehold property rights, as opposed to the typical analysis of fee ownership. Id.

Property is more than a mere thing a person owns. It is elementary that property rights are like a "bundle of sticks" which includes the right to acquire, use and dispose of the thing owned. Buchanan v. Warley, 245 U.S. 60, 74-75 (1917); Hendler v. United States, supra, 952 F.2d at 1374. The right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Kaiser Aetna v. United States, supra, 444 U.S. at 164; Hendler v. United States, supra, 952 F.2d at 1374. A property owner's right to explore and prospect his land to the exclusion of others is, therefore, a highly valuable property right in

and of itself. Grynberg I, 739 P.2d at 237; Layne v. Louisiana Co., 209 La. 1014, 26 So.2d 20, 22 (1946).[4]

Moreover, this Court has ruled that a property right is taken when the mineral estate owner is deprived of the right to mine when the owner must provide support to the surface estate. In Pennsylvania Coal Co. v. Mahon, supra, this Court stated:

> To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it . . . If in any case [the condemnor's] representatives have been so short-sighted as to acquire only the surface rights, without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right-of-way in the first place and refusing to pay for it . . .

260 U.S. at 414-415. Northglenn's actions in this case made it "commercially impracticable" for Grynberg to mine his coal. Thus, a taking occurred.

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[4]As discussed infra, the second (and most recent) decision of the Colorado Supreme Court is, perhaps, most perplexing on this point. If, as the Colorado Supreme Court ruled in Grynberg I, Grynberg's exclusive right of geophysical exploration was appropriated by Northglenn for a public purpose, then the sine qua non of that ruling is that a taking occurred. This is what the jury and Colorado Court of Appeals determined. Inexplicably, however, the Colorado Supreme Court failed to follow the logic and mandate of its own precedent.

Because Grynberg did not own the fee mineral estate, but rather owned the leasehold property interest to explore, prospect and mine the coal leasehold estate, his ability to use the property was limited to the mining rights which he acquired from the State of Colorado. When his ability to explore, prospect and mine his leasehold was substantially impaired or taken by the City's actions, no other use or value remained to Grynberg. That Grynberg's property rights were substantially impaired and taken by the City was demonstrated by the jury verdict and the factual discussion of the Colorado Court of Appeals.

In order to justify its ruling, the Colorado Supreme Court attempted to rewrite the actual evidence presented at trial. For instance, the court found (without any citation to the record) that, "Northglenn's acquisition of the surface estate had absolutely no effect on Grynberg's property rights." 846 P.2d at 175.[5] This holding was completely at odds with the proof at trial (confirmed by the Colorado Court of Appeals) to the effect that Grynberg's property rights were "negatively impacted because of the prohibition of mining under a reservoir embankment." 829 P.2d at 476.

Nor was there any factual predicate for the Colorado Supreme Court's conclusion that Northglenn's exploratory drilling "did not interfere with Grynberg's use, possession, enjoyment or disposition of his coal lease." City of Northglenn v. Grynberg, supra, 846 P.2d

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[5]We invite the Court to compare the factual analysis set out in Grynberg I at 829 P.2d 473, with the most recent opinion of the Colorado Supreme Court. This latter opinion is rife with unsubstantiated factual determinations and findings which are inconsistent with the facts as outlined in Grynberg I and with the award by the jury, which was based upon damages which Grynberg sustained.

at 182. This remarkable misstatement is confounding in light of the jury verdict and the testimony of several experts at trial, that after Northglenn had drilled on Grynberg's property and after it erroneously concluded in a public report there was no coal to mine, Grynberg's "mineral rights under the coal lease would no longer yield a willing buyer." Grynberg v. City of Northglenn, supra, 829 P.2d at 476. The ruling is also squarely at odds with the Colorado Supreme Court's prior ruling that Northglenn's drilling had violated Grynberg's property rights. Grynberg I, 739 P.2d at 235. What this inconsistency demonstrates is a result-oriented approach to the case which ran roughshod over Grynberg's constitutional rights.

Finally, the Colorado Supreme Court's conclusion that Grynberg's exclusive geophysical property rights were not taken, because Northglenn's (inaccurate) geophysical report was based upon public information, is just plain wrong. City of Northglenn v. Grynberg, 846 P.2d at 184.[6] Both the jury (which actually heard the evidence) and the Colorado Court of Appeals (which thoroughly

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[6]The Colorado Supreme Court incorrectly reasoned that Grynberg had suffered no "loss" because "Grynberg never had exclusive or near exclusive access to information about the geologic conditions" on his leasehold. 846 P.2d at 182. While it was true that Grynberg's leasehold lay on the edge of a coal field where there had been a great deal of drilling over time, Grynberg's lease was relatively unexplored. What little was known about Grynberg's coal lease showed recoverable reserves of approximately 4.4 million tons. Yet, Northglenn's drilling and its reports stated that there were "no commercially exploitable coal reserves under the reservoir site." 846 P.2d at 183, n.14. The question is not whether Grynberg's lease was situated in an area of historic coal mining. Rather, the question was whether Northglenn's exploratory drilling and acquisition of geologic information on a lease that was unexplored significantly impaired the value of Grynberg's property rights. The jury found that it did, and the Court of Appeals agreed with that decision.

reviewed the record) recognized that Northglenn's report was based in large measure upon a 600-foot deep exploratory core hole which Northglenn drilled. Before that hole was drilled and was incorrectly interpreted, public information indicated that Grynberg's reserves amounted to about 4.4 million tons of coal. Northglenn's report radically reduced this tonnage by about 90%, and destroyed Grynberg's ability to deal advantageously with his mineral rights. Grynberg v. City of Northglenn, 829 P.2d at 476; Layne Louisiana Co. v. Superior Oil Company, supra, 26 So.2d at 20 (unfavorable information about a mineral estate "quickly becomes known and thus impairs the power of the landowner to deal advantageously with his valuable mineral rights.").

When Northglenn acquired the surface overlying Grynberg's coal leasehold, it imposed an additional servitude upon Grynberg's coal estate. By acquiring the surface rights for its reservoir, Northglenn created a "no mining area" which prohibited Grynberg from mining the heart of his coal lease. Grynberg v. City of Northglenn, 829 P.2d at 476. Although the Colorado Supreme Court correctly stated that Grynberg owed a duty of subjacent support to Northglenn's surface estate at the time that this estate was purchased by Northglenn, Grynberg only owed a duty to support the surface in its natural state. Gladin v. von Engeln, 195 Colo. 88, 92, 575 P.2d 418, 421 (Colo. 1978). See also Restatement (Second) of Torts, §§ 820-21 (1979). The undisputed evidence presented at trial was that the "natural state" of the land did not include a reservoir, and that Grynberg could not mine under the reservoir embankment. The Colorado Supreme Court cast aside this undisputed finding as "purely speculative", even though there was no evidence in the record to contradict the jury verdict. Thus, like the Pennsylvania Coal Co. v. Mahon case, Grynberg's ability to mine his coal was destroyed and

a taking was effected when Northglenn acquired a surface estate to construct its wastewater reservoir. Compare Pennsylvania Coal Co. v. Mahon, 260 U.S. at 414 (law restricting subsurface extraction of coal held to effect a taking).

In Lucas v. South Carolina Coastal Council, supra, this Court found (in the context of a regulatory taking) that state actions which leave property "economically idle" create a taking under Amendments V and XIV of the United States Constitution. 112 S.Ct. at 2895. The Lucas decision involved a taking which rendered coastal property "economically idle" because of regulations which prohibited real estate development on that property. Likewise, the actions of the City of Northglenn, involving a physical taking of property rights, rendered Grynberg's property "economically idle". After Northglenn had unlawfully explored and prospected Grynberg's lease, and after Northglenn had imposed a burden on Grynberg's ability to mine under the wastewater reservoir site, Grynberg's leasehold rights had "no economically viable use". Id. 112 S.Ct. at 2896.

This Court should accept Grynberg's petition for two important reasons. First, this case gives the Court an opportunity to explain how its decision in Lucas would apply to a physical taking of mineral property rights. Secondly, the decision of the Colorado Supreme Court must be reversed because, while that decision gives lip service to Lucas, the practical reality of the ruling is that the Colorado Supreme Court has ignored it completely. Even though Grynberg has suffered "the loss of all economically beneficial or productive use of [his] land", Grynberg received no compensation whatsoever. Amendments V and XIV of the United States Constitution prohibit Colorado's courts from allowing the taking of a private citizen's real property rights without just compensation. By

accepting Grynberg's Petition, this Court will have the opportunity to further develop the Pennsylvania Coal and Lucas decisions, in the context of mining activity.

CONCLUSION

Petitioner respectfully requests that a writ of certiorari be granted, that the decision of the Colorado Supreme Court be reversed and that the jury verdict be reinstated. The case should then be remanded to the Colorado Supreme Court for further consideration of the issues which were raised by Grynberg, but which were not decided due to the court's disposition of the case.[7]

Respectfully submitted,

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May 14, 1993

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[7]The primary remaining issue is that of Grynberg's entitlement to prejudgment interest on the jury verdict; an issue on which certiorari was granted but which was not addressed by the Colorado Supreme Court.

SUPREME COURT, STATE OF COLORADO
No. 91SC767 February 16, 1993

CITY OF NORTHGLENN, COLORADO,
Petitioner/Cross-Respondent,

v.

JACK J. GRYNBERG,
Respondent/Cross-Petitioner.

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT REVERSED AND CASE REMANDED WITH DIRECTIONS

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JUSTICE MULLARKEY delivered the opinion of the Court.

JUSTICE ERICKSON specially concurs in the result and JUSTICE KIRSHBAUM joins the special concurrence.

JUSTICE SCOTT does not participate.

We issued a writ of certiorari to review the court of appeals decision in Grynberg v. Northglenn, 829 P.2d 473 (Colo. App. 1991) (Grynberg II), affirming an inverse condemnation judgment in favor of the plaintiff, Jack J. Grynberg, against the defendant, the City of Northglenn, which constructed a 6,000 acre-foot wastewater reservoir on land overlying part of Grynberg's mineral lease. The trial court found that Grynberg's property had been taken or damaged, and a jury of freeholders awarded him $646,930, plus interest, costs and attorney fees for a total of $862,155.05.

This action is before this court for the second time. In Grynberg v. City of Northglenn, 739 P.2d 230 (Colo. 1987) (Grynberg I), we held that Grynberg had a claim for geophysical trespass against the City of Northglenn for a test hole that Northglenn drilled into Grynberg's mineral estate in preparation for Northglenn's construction of the reservoir. We remanded the case to the trial court to develop a record and to consider affirmative defenses, such as governmental immunity.

On remand, Grynberg abandoned his tort claims, including the geophysical trespass claim, and proceeded on a theory of inverse condemnation. Pursuant to section 38-1-101, 16A C.R.S. (1982 & 1992 Supp.), the trial court determined all questions and issues except the amount of compensation, including that a taking or damaging had occurred. After a trial on damages to a jury of freeholders pursuant to section 38-1-106, Grynberg was awarded the amount described above and the verdict was affirmed by the court of appeals. We reverse.

I.

The facts as developed at trial after remand are essentially the same as those detailed in our previous opinion. See Grynberg I, 739 P.2d at 232-33. Other relevant facts will be described as appropriate in this opinion.

After remand, the trial court dismissed the tort claims against Northglenn. Grynberg elected to abandon his tort claims[1] and successfully proceeded on a theory of inverse condemnation. Northglenn appealed the verdict, which was affirmed by the court of appeals in Grynberg II, 829 P.2d 473. We granted Northglenn's petition for writ of certiorari on two issues: (1) whether the court of appeals erred in holding that the inability to mine under the reservoir and its embankment, the drilling of test holes, and the filing of a report constitute a taking within the meaning of Article II, Section 15 of the Colorado Constitution; and (2) whether the court of appeals erred in finding the evidence presented at trial was sufficient in law and fact to support the jury's verdict. We also granted Grynberg's cross-petition for writ of certiorari on the issue of whether Article II, Sections 15 and 25, of the Colorado Constitution require that the prejudgment interest awarded to Grynberg on his inverse condemnation judgment be calculated from the date of the taking of his property by the City of Northglenn. Because we conclude that there was no constitutional taking or damaging, we reverse on the first issue and do not address the other two issues.

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[1]Although, in his Opening Brief, Grynberg states that he did not "abandon" the tort claims, the fact is that the trial court dismissed them and Grynberg did not appeal this dismissal.

II.

Article II, Section 15 of the Colorado Constitution provides, in relevant part: "Private property shall not be taken or damaged, for public or private use, without just compensation." Inverse condemnation actions, as well as eminent domain actions, are based on this section. Ossman v. Mountain States Tel. & Tel. Co., 184 Colo. 360, 365, 520 P.2d 738, 741-42 (1974). Because an inverse condemnation action is based on the "takings" clause of our constitution, it is to be tried as if it were an eminent domain proceeding. Id. at 366. Section 38-1-101, 16A C.R.S. (1982 & 1992 Supp.),[2] provides that, in an eminent domain proceeding, the only issue that goes to the jury is the amount of compensation to be awarded. It is for the trial court alone to decide whether a taking has taken place. Prior to opening statements in this case, the trial court ruled that a taking had occurred. The ruling was based on the statements of counsel and stipulated facts as detailed in Grynberg I, although the trial court reserved the right to revisit its ruling. After the jury verdict, the trial court did not alter the initial ruling. However, the court made some statements revealing its uncertainty about the ruling:

> Okay this is a road we travelled down a number of times in the course of this, and it is somewhat comforting to know that whatever I decide here, I'm sure I will not be the last word on the subject. If we had a scale of zero to ten and zero meant I was sure

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[2]Section 38-1-101 was amended in 1984. Ch. 263, sec. 1, § 38-1-101, 1984 Colo. Sess. Laws 972, 972. The amendment is not material to the result reached here.

> I was wrong and ten meant I was sure I was right,
> we would be at a point of about 5.1 on that scale,
> and perhaps 5.01 as to what I'm going to do.

The facts that developed at trial, relative to the issue of whether a taking or damaging has occurred, were undisputed.[3] Under these circumstances we will first determine the applicable legal standard and then apply that standard to determine whether a constitutional taking or damaging has occurred. People ex rel. Woodard v. Colorado Springs Bd. of Realtors, Inc., 692 P.2d 1055, 1068 (Colo. 1984) (appellate court may apply proper legal standard to uncontroverted facts).

Ownership of the surface and mineral estates of the land at issue was severed at some time prior to the relevant events in this case. As part of his business exploring and prospecting for minerals, Grynberg leased the right to explore for coal in Section 36 (640 acres of land) for $640 per year from the State of Colorado which owned the mineral estate. He bought the coal lease from the state with the hope of selling all or some of the rights to explore and mine coal from the leasehold, or to mine the leasehold himself. Although Northglenn purchased the surface estate from the previous owner, it did not purchase or seek to condemn the mineral estate.

A taking occurs when an entity clothed with the power of eminent domain substantially deprives a property owner of the use and enjoyment of that property. See Lucas v. South Carolina Coastal

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[3]There was a great deal of controverted testimony. However, that testimony was relative to the amount of damages, the question before the jury, rather than the occurrence of a taking or damaging, the question before the trial court.

Council, ___ U.S. ___, ___, 112 S. Ct. 2886, 2895 (1992) (when owner called upon to sacrifice all economically beneficial uses of real property to the common good, owner has suffered a taking). See also Lipson v. Colorado State Dep't of Highways, 41 Colo. App. 568, 569, 588 P.2d 390, 391 (1978) (quoting City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 269 N.E.2d 895 (1971)) (requirements for a de facto taking are "a physical entry by the condemnor, a physical ouster of the owner, a legal interference with the physical use, possession or enjoyment of the property or a legal interference with the owner's power of disposition of the property."). To be entitled to compensation under the state constitution, there must be either a taking or a damaging of private property without just compensation.

It has been said that by including damaging in the just compensation provision, the Colorado Constitution affords an aggrieved property owner a greater measure of protection than does the Constitution of the United States. Mosher v. City of Boulder, 225 F. Supp. 32, 35 (D. Colo. 1964). Even without a "damage" provision in the relevant constitution or statute, the takings clause has been interpreted to compensate a property owner for incidental injury to the remainder of the property caused by a taking of some but not all of the property. La Plata Elec. Ass'n, Inc. v. Cummins, 728 P.2d 696, 698 (Colo. 1986);[4] see also 4A Julius L. Sackman, Patrick J.

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[4]Although it is true that this court was late in adopting this rule in La Plata Electric, this is the majority rule in the United States. See id. at 700 n.3. In La Plata Electric, we held that a landowner must be compensated for all damages that are the natural, necessary and reasonable result of a partial taking. Proof that a property owner incurred damage which differs in kind from the damage suffered by

(continued...)

Rohan, Nichols on Eminent Domain § 14.02[l] at 14-29 (1993). For example, under a pure takings clause (such as that in the United States Constitution), no compensation would be due to a property owner for injury caused by a highway built on property immediately adjacent to a property owner's land, while an owner who had only a minuscule portion of his or her property taken for such a highway would be due compensation. Such a result may well be inequitable, see La Plata Electric at 705 (Rovira, J., dissenting), but the same result would be reached if a private landowner built an improvement at the boundary of his or her property. The intent of including the word "damaged" in the constitution was to grant relief to property owners who had been substantially damaged by the making of such public improvements abutting their lands, but whose land had not been physically taken by the government. See City of Pueblo v. Strait, 20 Colo. 13, 18, 236 P. 789, 791 (1894).

Most of this court's cases construing this provision of our constitution have dealt with governmental obstruction of ingress and egress to property, see, e.g., id. (building of a viaduct eight feet above a public street); State Dept. of Highways v. Interstate-Denver West, 791 P.2d 1119 (Colo. 1990) (one of two access points to public streets taken by condemnation); Troiano v. Colorado Dept. of Highways, 170 Colo. 484, 463 P.2d 448 (1969) (building of Interstate 70), or extraordinary changes in the use of a street. Denver Circle R.R. Co. v. Nestor, 10 Colo. 403, 15 P. 714 (1887) (building a steam railroad in public street); City of Denver v. Bayer, 7 Colo. 113, 2 P. 6 (1883) (same). See also Game and Fish Comm'n v.

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[4](...continued)
the general public, however, remains a requirement for inverse condemnation cases alleging damage when no property is taken. Id. at 701-02.

Farmers Irrigation Co., 149 Colo. 318, 369 P.2d 557 (1962) (release of pollution from a fish hatchery, polluting domestic water supply of downstream users, states a claim for a "damaging" of private property for public use).

To recover in a damaging case, then, the owner must show a unique or special injury which is different in kind from, or not common to, the general public. The damage must be to the property or its appurtenances, or it must affect some right or interest which the owner enjoys in connection with the property and which is not shared with or enjoyed by the public generally. In no case has mere depreciation in value been grounds to award just compensation for a damaging of property. In none of our previous cases have we held the acquisition of an already-severed surface estate, or preliminary site preparation activities, or the mere filing of a report, without more, to be sufficient for recovery for a "damaging" of property for the purposes of Article II, Section 15.

We refuse to reconsider the long-standing construction of this constitutional provision that compensation is not due to a property owner merely if that person's property value is depreciated by government action. In light of the judicial abrogation of governmental and sovereign immunity, Evans v. Board of County Comm'rs, 174 Colo. 97, 482 P.2d 968 (1971), and the enactment of the Governmental Immunity Act, sections 24-10-101 to -120, 10A C.R.S. (1988 & 1992 Supp.), there is no reason to enlarge the scope

of constitutionally compensable damagings of property.[5] See Kratzenstein v. Board of County Comm'rs, 674 P.2d 1009, 1010 (Colo. App. 1983) (noting that early Colorado decisions favored inverse condemnation proceedings in public improvement cases). With these principles in mind, we turn to Grynberg's contentions.

III.

Grynberg alleges that, by the following actions, Northglenn has taken or damaged his coal lease: (1) the acquisition of the surface estate over his coal lease; (2) the drilling of one 600-foot core hole by Northglenn's contractor Chen and Associates, Inc. (Chen) as part of a geotechnical engineering survey of the parcel; and (3) the publishing of the Chen report stating that there were no commercially exploitable coal reserves in Grynberg's coal lease. We will discuss each contention with respect to Grynberg's taking claim and then consider his damaging claim.

A.

Grynberg first argues that Northglenn took Grynberg's property by the acquisition of the surface estate for the west half of Section 36. Grynberg argues that our holding in William E. Russell Coal Co. v. Board of County Comm'rs, 129 Colo. 330, 270 P.2d

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[5]This does not mean that a taking is not effected where government action results in a permanent occupation of property, or the loss of all economically beneficial or productive use of land. See, e.g., Lucas v. South Carolina Coastal Council, ___ U.S. ___, 112 S.Ct. 2886, 2893 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987).

772 (1954), controls this question, and that, therefore, Northglenn's acquisition of the surface estate amounts to a taking. While we agree that Russell Coal is a controlling case, we do not agree that there was any taking here.

In Russell Coal, the Board of Commissioners of Boulder County and the State Highway Department condemned only the surface estate of property which, along with the mineral estate, belonged to a coal mining company. The coal company argued that there had been a taking of its mineral estate because: this condemnation severed the surface estate from the mineral estate; the subjacent support required by the surface estate so as not to cause subsidence would not allow the company to mine certain of the coal in place; and the cost would be greater to mine the coal that it could extract. Id. at 334-35. The highway department argued that it did not seek to acquire subjacent support for its highway right-of-way, and would waive or release this right. We held that, because the mining company legally owed the highway department this duty of subjacent support, and the highway department could not waive this right, which was for the benefit of the public in general, the coal company was entitled to just compensation for the servitude placed on its remaining property, i.e., the mineral estate, which was not taken by eminent domain. Id. at 335-36.[6]

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[6]Russell Coal was a takings case, not a damage case. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). Compensation under takings law was clearly awardable to the mining company there for two reasons. First, and simplest, part of the property was forcibly conveyed, as appurtenant to the newly-severed surface estate. The property so conveyed was the support easement which we held is conveyed, as a matter of law, to the surface estate owner when the surface and

(continued...)

Here, however, the surface and mineral estates had been severed before either Grynberg or Northglenn came into contact with the parcel. Even before Northglenn acquired the surface estate, the owner of the mineral estate owed a duty of subjacent support to the owner of the surface estate. When Northglenn purchased the surface estate, one of the "bundle of rights" Northglenn acquired was the previous owner's right to demand subjacent support from mineral estate, albeit only for the land in its natural state.[7] As we stated in

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[6](...continued)
mineral estates are severed. Second, the taking of the surface estate in Russell Coal was a partial taking and, under general takings law (without reverting to a constitutional prohibition of "damage" to private property without compensation), a property owner is entitled to compensation for injury to the remainder of the property. La Plata Electric, 728 P.2d 696. The term "damage" was used by the Russell Coal court in the nontechnical sense of injury.

[7]Once the reservoir had been built, the owner of the mineral estate would still owe only a duty to support the surface in its natural state, and would be strictly liable for subsidence resulting from mining operations under the reservoir only if the subsidence would have occurred even if the land had remained in its natural state. Gladin v. von Engeln, 195 Colo. 88, 92, 575 P.2d 418, 421 (Colo. 1978). See also Restatement (Second) of Torts §§ 820-21 (1979) (withdrawal of subjacent support). Although a subsurface owner may be liable in negligence for withdrawing subjacent support of artificial additions to land, id. § 821, soil has a greater specific gravity than water, and there is no evidence in the record that water from a reservoir would seep deep enough into the ground to interfere with mining operations. See also id. § 820, cmt. d ("Subjacent support that is not naturally necessary is nearly always support for artificial conditions on the surface. The weight of the supported artificial additions is generally slight compared with the weight of the supported land. . . . The burden is placed on the defendant actor of introducing evidence that the land would not have subsided if there had been no artificial additions on it.").

(continued...)

Russell Coal, "when a separation of the surface rights from mineral rights has occurred, in the absence of an express agreement otherwise, the duty of mineral estate is bound to support the surface." Id. at 335. See Victor-American Fuel Co. v. Wiggins, 746 P.2d 58, 59-60 (Colo. App. 1987) ("When the surface and mineral estates have been severed, the mineral estate owner may remove the minerals, but he must support the surface."); Smith v. Moore, 172 Colo. 440, 474 P.2d 794 (1970) (same). Therefore, when Northglenn acquired the surface estate, the obligation of the mineral estate owner to provide subjacent support to the surface estate owner was one of the "bundle of rights" acquired by Northglenn along with title to the surface estate for the west half of Section 36. Grynberg, as the lessee, was bound by the mineral estate owner's duty of support so that Northglenn's purchase of the surface caused no change to him; Grynberg lost nothing that he had had previously. Northglenn's acquisition of the surface estate had absolutely no effect on Grynberg's property rights as lessee of the mineral estate because Grynberg was not prevented from exploring or mining coal lying under the proposed site of the

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[7](...continued)

Even if we did conclude that the acquisition of the surface brought about a taking (or damaging) of Grynberg's coal lease to the extent that it was forced to support a reservoir, we could not affirm the trial court's judgment. There was no evidence before the jury as to how much coal from a hypothetical mining operation under section 36 would be required to remain in place to support a reservoir as then proposed by Northglenn; the jury's valuation, to the extent the acquisition of the surface allegedly was a taking, was purely speculative.

reservoir.[8] The surface estate was cultivated farmland both before and after it was purchased by Northglenn.

Furthermore, even assuming that construction of the reservoir on the surface estate affected the duty of access of the mineral estate owner or made that owner unable to mine the coal lying at a certain depth under the reservoir and the embankment, this question is not before the court. By the time Northglenn began site preparation for the reservoir, Grynberg had conveyed the mineral lease to his wife who is not a party to this action.

B.

Grynberg next argues that a taking was effected by Northglenn's unauthorized drilling of a 600-foot test hole to determine if there were commercially exploitable coal reserves and to investigate potential subsidence problems below the proposed reservoir site. The hole in question (as well as another hole drilled on another section not leased to Grynberg) was drilled at the direction of Chen, one of Northglenn's subcontractors, which did an engineering geology and soils investigation for the proposed reservoir. More specifically, Grynberg complains that his property was taken by Northglenn's

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[8]Grynberg also argues that Northglenn's activities beginning in 1978, including exploratory drilling, and acquisition of the surface, constituted "construction" of the reservoir. While we do not express an opinion on whether such preparatory activities constitute "construction," Grynberg makes no showing that such activities interfered with his access or property rights to the mineral estate or that he was unable to explore for or to mine coal from the property at any time up to and including March 3, 1980, when he assigned his coal lease to Celeste C. Grynberg, his wife.

acquisition of proprietary information belonging exclusively to Grynberg by virtue of his ownership of the coal lease and Northglenn's subsequent publication of that information. We do not agree.

Initially we note that the drilling of the test hole in and of itself does not effect a taking. Although the digging of the test hole was a physical invasion of Grynberg's real property, it did not rise to the level of a taking. A taking can be effected by a legal interference with the physical use, possession, enjoyment, or disposition of property, or by acts which translate to an exercise of dominion and control by a governmental entity. Lipson v. State Dep't of Highways, 588 P.2d 390, 391-92 (Colo. App. 1978). The drilling itself did not interfere with Grynberg's use, possession, enjoyment, or disposition of his coal lease. The drilling of the test hole, a single, transitory physical invasion of Grynberg's coal lease, does not translate to an exercise of dominion and control of the coal lease.[9] See Purveyor v. Red River Auth. of Texas, 383 S.W.2d 878 (Tex. Civ. App. 1964) (core drilling without authorization held not a taking).

While the drilling itself clearly does not effect a taking, the information derived from that drilling presents a more complex

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[9]Grynberg cites three cases from other jurisdictions to support his contention that unauthorized drilling and exploration constitute a taking and damaging of his property rights. Jacobsen v. Superior Court, 192 Cal. 319, 219 P. 986 (1923); Mackie v. Mayor & Comm'rs of Elkton, 265 Md. 410, 290 A.2d 500 (1923); Hendler v. United States, 952 F.2d 1364 (Fed. Cir. 1991). None of these cases is on point. All involve owners of the surface estate, extensive excavation of the property, and longterm occupation of the land.

question. An owner of mineral rights has a property interest in the proprietary information which can be gathered by way of geophysical exploration of his or her land. Grynberg I, 739 P.2d at 236-37. See Ruckelshaus v. Monsanto, 467 U.S. 986, 1001-04 (1984) (owner of trade secret has property right, protected by the Fifth Amendment, in that trade secret). Much of the value of an unexplored coal lease is that information regarding the coal is unknown. An owner, who may not have the wherewithal to mine or to explore for minerals, may be able to make a substantial profit by selling an option to mine the minerals to someone who does possess the resources to explore or mine the minerals.[10] Grynberg I at 237 (quoting Layne Louisiana Co. v. Superior Oil Co., 209 La. 1014, 26 So.2d 20, 22 (1946)). This presupposes, however, that the property owner has exclusive or near-exclusive access to the mineral information.

Here, Grynberg never had exclusive or near-exclusive access to information about the geological conditions including minerals under Section 36. Section 36 is part of the Boulder-Weld coalfield, which has been mined since the Civil War. In 1966, the United States Bureau of Mines published a report entitled Analysis of the Coal Industry in Boulder-Weld Coalfield, Colorado. This report included an isopach or equal-thickness contour map showing estimated coal thicknesses in the Boulder-Weld coalfield; the coal thickness in

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[10]While, in Grynberg I, we held that a person has a cause of action arising out of unlawful geophysical exploration, we did not reach any conclusions about the scope of recovery in such an action.

Section 36 is shown as 2.5 feet or less.[11] A defense expert, whose testimony was not contradicted, stated that the United States Geological Survey (USGS) established a standard in 1973 that coal had to be at least 2.5 feet thick to be considered a resource, and that subbituminous coal 2.5 to 5 feet thick was a sub-economic resource, i.e., that it was not thick enough to mine economically.[12] The USGS and Adolph Coors Co. previously had drilled test holes in Section 36. Both the USGS and Coors drilled two holes each; the USGS was searching for groundwater and Coors was searching for coal.[13] The Coors holes, drilled in the southern and southeastern part of Section 36, showed 5 and 3 feet of coal, respectively. The USGS holes, drilled in the northwestern part of Section 36, showed 5 foot and 6.6 foot thick coalbeds. The 6.6 foot thickness, however, included a 1.6 or 1.7 foot shale parting, which would leave only 4.9 or 5 feet of coal. Schaeffer and Roland, Inc., Northglenn's general contractor, obtained the geological logs from these test holes, as well

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[11]This report, as well as certain other exhibits, were entered into evidence, but not included in the record on appeal. However, the narrative description of these exhibits was uncontradicted, and is sufficient to make this conclusion.

[12]Another defense expert, Louis A. Gaz, with 28 years experience as a geologist, including nine years of experience in mining in the Boulder-Weld coalfield, testified that, in the late 1970s, companies mining in the Boulder-Weld coalfield mined coal seams eight to ten feet thick, and had to leave three feet of coal in place as a roof to prevent cave-ins.

[13]The USGS drilled with Grynberg's permission in late 1977. Coors was the assignee of a previous coal lease to Clayton Coal Company and drilled its holes in March of 1973. Coors abandoned the lease after concluding that any coal within the leasehold boundaries was not economically recoverable. Grynberg I, 739 P.2d at 232.

as those from seven other holes drilled on nearby sections, and provided them to Chen for use in preparing Chen's engineering geology and soils investigation report. Chen used these logs, along with the data derived from the hole sunk by Chen.[14] The USGS logs were in the public domain, and the other logs obviously were readily available to an interested party.

In Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984), the Court held that trade secrets[15] are property entitled to protection under the Fifth Amendment's Takings Clause. Id. at 1003-04. The Court explained that

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[14]Chen contracted with Cameron Engineers for the drilling and logging of the two holes drilled to determine the potential for recoverable coal reserves underlying Section 36. The Cameron report to Chen, which concluded that there were no commercially exploitable coal reserves under the reservoir site, was appended to the Chen report.

[15]Under the Uniform Trade Secrets Act, §§ 7-74-101 - 7-74-110, 3A C.R.S. (1986), trade secrets are defined as:

> [T]he whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses, or telephone numbers, or other information relating to any business or profession which is secret and of value. To be a "trade secret" the owner thereof must have taken measures to prevent the secret from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

§ 7-74-102(4).

> [b]ecause of the intangible nature of a trade secret, the extent of the property right therein is defined by the extent to which the owner of the secret protects his interest from disclosure to others. Information that is public knowledge or that is generally known in an industry cannot be a trade secret. If an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished.

[citations omitted]. Id. at 1002. "Once the data that constitute a trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in the data." Id. at 1011.

The record does not indicate that the Chen drilling log data contained any information different in kind from the drilling logs from the previous exploration holes or from other publicly available information. Robert L. Sprinkel, Jr., a defense expert geologist with almost sixty years of experience in mineral evaluation, testified that, using the information available in 1966, he would have estimated that the sub-economic coal resources in Section 36 totalled about 35,000 tons. A sub-economic resource refers to a coal bed 2.5 to 5 feet thick which, according to the USGS, cannot be economically mined.[16] With the addition of the Coors log information, this estimate of total resources would have increased to 2.4 million tons, including about

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[16]The defense witnesses were impeached as to their ignorance as to whether or not such a thickness of coal was truly not economical to mine.

250,000 tons of economic resources, that is, coal seams over five feet thick. Finally, with the addition of the USGS and Chen holes, this estimation of total resources increases to about 4.5 million tons, with economic resources of about a half-million tons. Although Sprinkel did not prepare an exhibit of his estimate of resources without the Chen report, he testified, without contradiction, that the information from the Chen hole "did not have much impact. It . . . didn't change the amount of coal in general of three feet of coal in the area of where it was drilled."

Thus, the conclusion reached by the Chen report that coal mining under Section 36 was not commercially feasible was not based on proprietary or secret information gained as a result of the exploratory hole drilled by Chen in Section 36. The same basic information was contained in the Bureau of Mines report, as well as the USGS and Coors drilling logs, and Grynberg has failed to prove that the Chen report infringed on a trade secret or on otherwise exclusive proprietary information.[17]

C.

Grynberg's third argument is that the filing of the Chen report constitutes a taking. We do not agree.

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[17]While we do not decide here whether geophysical information in general may or may not be a "trade secret," the amount of information publicly available regarding the coal reserves under Section 36 clearly shows that Grynberg's access to the information was not sufficiently exclusive to qualify as a trade secret, especially in light of the fact that the Chen hole's results, i.e., that the coal thickness was approximately three feet thick, were in agreement with all the publicly available information.

As an initial matter, the court of appeals previously has held that "the mere announcement of impending condemnations, coupled as it may well be with substantial delay and damage, does not, in the absence of the acts which may be translated into an exercise of dominion and control by the condemning authority, constitute a taking so as to warrant awarding compensation." Lipson v. State Dep't of Highways, 41 Colo. App. 568, 570, 588 P.2d 390, 391-92 (1978) (emphasis in original). Similarly, the mere publication of a report that states that a leaseholder's leased property does not have commercially exploitable coal reserves is not, by itself, a taking of property. Second, as explained above, we conclude that the information in the Chen report was not proprietary information, and therefore disclosure of such information cannot be a taking of a trade secret.[18] Therefore, Grynberg's only remaining complaint about the Chen report is that it was not accurate.[19] To the extent that Grynberg has a claim based on the inaccuracy of the Chen report, such a claim lies in tort or could lie in tort. Desert Truck Sales v. Denver, 837 P.2d 759, 765 (Colo. 1992). The State of Colorado and

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[18]As stated above, we do not decide here whether or not the information as represented by the undiscovered data from an unexplored mineral lease is a "trade secret" or other property which is protected by the federal or state constitutions.

[19]Even though the Chen report contained inaccuracies, such as stating that the coal thicknesses under the proposed reservoir site was .5 to 2.5 feet thick, rather than 2.5 to 5 feet thick, the report's general conclusions appear to be in accord with the Bureau of Mines report and Coors' conclusion that the coal was not economically minable in the late 1970s and 1980.

its political subdivisions have not waived sovereign immunity for such a claim.[20] § 24-10-106, 10A C.R.S. (1988 & 1992 Supp.).

D.

Finally, we determine that Grynberg has not made out a case showing a constitutional damaging of his property. While it does appear that his coal lease was diminished in value, this is not sufficient. During the relevant time, Northglenn did not change the character of the use of the surface estate or other neighboring property. See Denver Circle R.R. Co. v. Nestor, 10 Colo. 403, 15 P. 714 (1887). From the time that Grynberg obtained the coal lease until the time that he conveyed the coal lease to his wife, the surface was used as agricultural land. Northglenn did nothing which would have impaired Grynberg's exploration for or mining of coal in the coal lease.

Furthermore, there is no evidence that Northglenn obstructed Grynberg's ingress or egress to his property. There is no evidence

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[20]We realize that an inverse condemnation claim arising from, for example, a physical occupation and ouster of the owner of real property, may lie in trespass as well, and would appear to come under the Governmental Immunity Act, sections 24-10-101 - 24-10-120, 10A C.R.S. (1989 & 1992 Supp.). See Ossman v. Mountain States Tel. & Tel. Co., 184 Colo. 360, 520 P.2d 738 (1974). Without stating today where (or even if) the line is to be drawn, we note the reasoning of the court of appeals in Jorgenson v. City of Aurora, 767 P.2d 756, 758 (Colo. App. 1988) ("Given the constitutional genesis of a claim for inverse condemnation, and considering the nature of the right upon which this action is founded, we hold that this claim is not subject to the limitations of the Governmental Immunity Act"). We leave for another day resolution of any apparent conflict between the Governmental Immunity Act and Article II, Section 15 of the state constitution.

that Northglenn's acts affected a right or interest he enjoyed in connection with his property which is not shared with or enjoyed by the public generally. In other words, the law of constitutional damagings does not apply to the undisputed facts of this case.

IV.

We conclude that Grynberg did not prove a taking or damaging of his property pursuant to Article II, Section 14 of the Colorado Constitution, by Northglenn's acquisition of the surface estate, the drilling, or the publication of the Chen report. Because there was no taking or damaging of Grynberg's property, we reverse the judgment of the court of appeals and remand the case with directions to return the case to the district court for the dismissal of Grynberg's inverse condemnation action.

JUSTICE ERICKSON specially concurs in the result and JUSTICE KIRSHBAUM joins the special concurrence.

JUSTICE SCOTT does not participate.

City of Northglenn v. Grynberg, No. 91SC767

JUSTICE ERICKSON specially concurring in the result:

I agree that in this case, private property was not unconstitutionally taken or damaged under article II, section 15 of the Colorado Constitution (the "Taking Clause"). I write separately, however, to address the question of when property is unconstitutionally "taken" or "damaged" in an inverse condemnation proceeding, an issue that the majority only summarily discusses.

I

In 1977, the City of Northglenn began a search for potential sites for a wastewater reservoir which would become part of a comprehensive wastewater treatment project.[1] One of the ten potential sites selected was the West half of Section 36, Township 1 North, Range 68 West of the 6th P.M. in Weld County, Colorado (the site). The mineral estate of the site had been severed from the surface estate and was owned by the State of Colorado, which issued a coal lease to Jack Grynberg.

By February 1978, Northglenn had selected the site as the best location for the reservoir. Northglenn began negotiations with the surface owner to acquire the reservoir site and subsequently announced publicly that the site had been selected for the reservoir.

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[1]A bond issue to finance the reservoir passed in July 1977, and bonds were issued and sold at various times throughout the project to finance the construction.

Northglenn obtained permission from the surface owner to drill test holes on the site to assess the suitability of the site for construction of the reservoir, but did not obtain the permission of either the State of Colorado or Grynberg. An engineering consultant prepared a geology and soils investigation report based on the information obtained from the drilling and filed the report with the state engineer's office on April 25, 1978.

On June 1, 1978, Northglenn purchased the surface estate for $609,000. Grynberg assigned his coal lease to his wife on March 3, 1980. In November 1980, Grynberg brought suit against Northglenn asserting numerous claims for relief, including an inverse condemnation claim. Not until March 1981, did Northglenn begin actual construction of the reservoir on the site.

II

The question in this case is whether property was unconstitutionally taken or damaged prior to the assignment of the coal lease by Grynberg to his wife. The two procedural devices for guaranteeing that private property will not be unconstitutionally taken or damaged for public use without just compensation are eminent domain and inverse condemnation.

While a public entity seeks to condemn property and pay just compensation in an eminent domain action, a property owner must commence an inverse condemnation action. United States v. Clarke, 445 U.S. 253, 257 (1980) (stating that inverse condemnation is a "shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted"); State Dept. of Health v. The

Mill, 809 P.2d 434, 437 (Colo. 1991) (same). An inverse condemnation action often arises because the public entity has refused to exercise its eminent domain power. Morrison v. City of Aurora, 745 P.2d 1042, 1045 (Colo. App. 1987) (noting that an inverse condemnation action is the taking of private property by a public entity which has refused to exercise its eminent domain power). In an inverse condemnation action, the property owner must establish that a taking or damage occurred, whereas in an eminent domain action, the condemning authority sets forth with specificity the property that is to be taken.

The difficult question in an inverse condemnation action is when the property is taken or damaged. In a physical taking case, the taking or damage "occurs" at a certain point and the unconstitutional taking or damage continues until the taking or damage ceases, or just compensation is paid. State Dept. of Health, 809 P.2d at 438. Under eminent domain, the taking or damage occurs contemporaneously with the institution of the condemnation proceedings. Because there is no "condemnation proceeding" in an inverse condemnation action, however, there is no one single uniform date at which the taking or damage "occurs." Instead, in an inverse condemnation action, courts examine the question of whether the Taking Clause has been violated and then determine the date when the property was taken or damaged.[2]

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[2]In many cases, however, courts have also recognized that the date of the taking may occur sometime before the de jure taking. Under a "de facto taking" analysis, the date of the taking is moved forward to reflect the actual taking (or substantial interference with the use and enjoyment of the property) which preceded the formal

(continued...)

III
A

In William E. Russell Coal Co. v. Board of County Comm'rs, 129 Colo. 330, 270 P.2d 772 (1954), we addressed a similar claim in an action brought by the holder of a mineral estate for a violation of the Taking Clause. The public entity acquired the surface estate by condemnation in order to construct a road but did not condemn the mineral estate. The public entity essentially argued that it was not required to compensate the holder of the mineral estate because the road was not yet constructed and because it had acquired only the surface estate.

We disagreed and held that "when land is acquired by condemnation for a highway, the condemnor acquires not only what is understandably known as just the surface [but] whatever is necessary for the support of the surface." Russell Coal, 129 Colo. at 334-35, 270 P.2d at 774. We recognized that the duty of a mineral estate holder to support the proposed construction imposed an additional servitude on the mineral estate and unconstitutionally damaged his property rights. Id.

We stated that "if a duty rests upon the owner of the mineral rights to preserve and support the highway by not having the benefit of his mineral property right, it then follows that he suffers a damage for which compensation should flow." Id. at 334, 270 P.2d at 774

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[2](...continued)
or legal taking. See generally Julius L. Sackman & Patrick J. Rohan, 4 Nichols' the Law of Eminent Domain § 12B.17[6] (3d ed. 1978 & 1993 Supp.) [hereinafter Nichols]. See also infra note 3 (discussing de facto taking analysis).

whether Grynberg lost the benefit of his property right prior to his assignment of the mineral estate to his wife.[3]

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[3]I am troubled by the majority's citation to and continued reliance upon Lipson v. Colorado State Dep't of Highways, 41 Colo. App. 568, 569, 588 P.2d 390, 391 (1978). See maj. op. at 6 (stating that for a de facto taking, there must be "a physical entry by the condemnor, a physical ouster of the owner, a legal interference with the physical use, possession or enjoyment of the property or a legal interference with the owner's power of disposition of the property") (quoting City of Buffalo v. J.W. Clement Co., 269 N.E.2d 895 (N.Y. 1971)); see also maj. op. at 14-15 (citing Lipson); maj. op. at 20 (quoting language from City of Buffalo in Lipson). Moreover, the majority erroneously bases its analysis of the questions of whether the unauthorized drilling or the filing of the Chen report constituted a taking upon Lipson. See maj. op. at 14-15, 20.

In fact, the language cited by the majority does not provide a standard for a taking, but instead states one test that courts use to determine whether a "de facto taking" has occurred. Both Lipson and City of Buffalo specifically addressed de facto taking arguments. However, Grynberg has not asserted that Northglenn's actions, culminating with the acquisition of the surface estate, constituted a de facto taking, nor does the majority address Grynberg's claims as a de facto taking.

The de facto taking issue poses difficult legal questions and courts have not uniformly addressed the requirements for a de facto taking. See, e.g., Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich 1966) (finding that de facto taking did not require a physical invasion of property), aff 'd on other grounds, 405 F.2d 138 (8th Cir. 1968); In re Elmwood Park Project Section 1, Group B, 136 N.W.2d 896 (Mich. 1965) (same); Conroy-Pugh Glass Co. v. Commonwealth, 321 A.2d 598 (Pa. 1974) (de facto taking occurs when an entity clothed with the power of eminent domain substantially deprives an owner of the use and enjoyment of the property, but does not necessarily require a physical invasion). A de facto taking has also been described as follows:

(continued...)

B

Two separate estates are created when the mineral rights are severed from the surface estate. See Simson v. Langholf, 133 Colo. 208, 215-17, 293 P.2d 302, 307 (1956). The majority recognizes that the owner of the severed mineral estate owes a duty of subjacent support to the surface estate in its natural state. Maj. op. at 11-12.[4]

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[3](...continued)

> If the prospective actual execution of a proposed municipal project will deprive the property owner of a beneficial use of his property by substantial impairment of some significant appurtenant right, and, as [a] result of advanced municipal publicity about the project plan and its consequences, the property loses its existent utility and financial viability to the point of subjecting the owner to losing the property, then a de facto taking must be deemed to have occurred.

4 Nichols Sec. 12B.17[6], at 12B-229.

I would not reach the question of the scope or requirements of a de facto taking because this question has not been briefed or argued before this court. However, I note my disagreement with the majority's decision to equate the Lipson standard for a de facto taking to all taking analysis and the application of the standard to the facts of this case. In my view, the majority's reliance on the Lipson standard as the basis for its taking analysis, in a case where the de facto taking question has not been raised, in improper and inaccurate.

[4]Noonan v. Pardee, 50 A. 255 (Pa. 1901), explained the duty of subjacent support as follows:

(continued...)

However, the majority ignores the corresponding property rights that comprise a severed mineral estate. The owner of a mineral estate also possesses rights of ingress, egress, exploration, and surface usage as are reasonably necessary to the successful exploitation of his mineral interest. Rocky Mountain Fuel Co. v. Heflin, 148 Colo. 415, 422, 366 P.2d 577, 580 (1962); Chambers-Liberty Counties Navigation Dist. v. Banta, 453 S.W.2d 134, 136 (Tex. 1970).[5] Grynberg also claims that in Grynberg v. City of Northglenn, 739 P.2d 230 (Colo. 1987) [hereinafter Grynberg I], we recognized an additional and exclusive property right of the owner of the mineral estate to consent to geophysical exploration that is constitutionally

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[4](...continued)

> Where there has been a horizontal division of the land; the owner of the subjacent estate, coal or other mineral, owes to the superincumbent owner a right of support. This is an absolute right arising out of the ownership of the surface. Good or ban mining in no way affects the responsibility. What the surface owner has a right to demand is sufficient support, even, if to that end, it be necessary to leave every pound of coal untouched under his land.

Noonan, 50 A. at 256. The duty of subjacent support is owed only to the land in its natural condition. 6 American Law of Mining § 203.02[l], at 203-23 (2d ed. 1992); Roger A. Cunningham, et al., The Law of Property, § 7.4, at 420 (1984).

[5]Without the right to develop the minerals, there is no purpose to severing the estates. Moreover, if the surface estate cannot be used, in most instances, the minerals cannot be extracted and the mineral estate is worthless.

actionable. In my view, Grynberg mischaracterizes our holding in Grynberg I.[6]

Actionable constitutional damage occurs if a public entity deprives the owner of the mineral estate the benefit of his mineral property right. Russell Coal, 129 Colo. at 334, 270 P.2d at 774.[7] In many cases, the date of construction on the surface estate will serve as the date of the taking or damage to the severed mineral estate. In my view, however, the holder of a mineral estate need not wait for construction to actually begin on the surface estate to bring

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[6]In Grynberg I, we merely held that a geophysical trespass was actionable. Grynberg I, 739 P.2d at 239. The proper claim for the invasion of the property interest and the publication of the information does not lie in inverse condemnation, but rather should be brought in trespass or another action in tort.

In this case, the trial court dismissed Grynberg's other claims for relief. Because Grynberg did not appeal the dismissal, I would not reach the issue of whether these actions were properly dismissed or are barred by the Governmental Immunity Act, section 24-10-101 to -120, 10A C.R.S. (1989 & 1992 Supp.).

[7]I disagree with the majority that the questions of whether the construction of the reservoir either affected the access of the mineral estate owner or made the owner unable to mine the coal are not before us. Maj. op. at 13.

In fact, these questions are central to the determination of whether Northglenn deprived Grynberg of the benefit of his mineral property right and whether Grynberg can assert a constitutional claim for compensation. These questions necessarily must be answered to arrive at a conclusion that "Grynberg was not prevented from exploring or mining coal lying under the proposed site of the reservoir." Id.

an inverse condemnation action if he can establish that the public entity has deprived him of the benefit of his mineral property right.[8]

In this case, however, Grynberg was not prevented from asserting his rights in the mineral estate prior to the conveyance to his wife. See Chambers-Liberty, 453 S.W.2d at 137 (holding that until an interference with a property right occurs, the public entity is not required to pay compensation). Accordingly, I concur with the majority's conclusion that property was not unconstitutionally taken or damaged.[9]

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[8]Moreover, I disagree with the majority's conclusion that a diminution in value can never support a constitutional claim. In my view, this conclusion cannot be reconciled with the majority's statement that a "taking occurs when a public entity clothed with the power of eminent domain substantially deprives a property owner of the use and enjoyment of that property." Maj. op. at 6.

The holder of a mineral estate may have an actionable constitutional damage claim based on a depreciation in market value if the public entity has deprived him of the benefit of his mineral property right. The claim would arise as of the time of the deprivation. For example, a property owner would be entitled to compensation for a diminution in the value of the property based on a material and substantial impairment of the right to access. In my view, an assertion by the holder of a mineral estate that he was unable to mine his estate in the most reasonable, lowest-risk, and most cost effective method because of the actions of the public entity would constitute an actionable constitutional claim, because it would substantially deprive him of the use and enjoyment of that property.

[9]However, I note my concern with the majority's analysis of the question of whether there was an unconstitutional "damage." Specifically, I disagree with any implication that some physical improvement or change of character of abutting or

(continued...)

I am authorized to say that JUSTICE KIRSHBAUM joins in this special concurrence.

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[9](...continued)
neighboring property is a prerequisite to recovery for an unconstitutional "damage." Maj. op. at 22 (citing Denver Circle R.R. Co. v. Nestor, 10 Colo. 403, 15 P. 474 (1887)).

I agree that the owner must show a unique or special injury that is different in kind from or not common to the general public to recover in a "damage" case. Radinsky v. City & County of Denver, 159 Colo. 134, 138, 410 P.2d 644, 646 (1966). However, there is no absolute prerequisite of "some physical improvement or change of character" to establish an unconstitutional "damage."

In my view, if Northglenn had deprived Grynberg of his right of access to the surface estate, Grynberg would have been able to establish a claim for an unconstitutional "damage." In such a case, Grynberg would clearly suffer a unique or special injury (the deprivation of his right of access), despite the lack of physical improvement or change of character in the surface estate.

COLORADO COURT OF APPEALS October 10, 1991
No. 90 CA 0721

Jack J. Grynberg,

Plaintiff-Appellee and Cross-Appellant,

v.

City of Northglenn, Colorado,

Defendant-Appellant and Cross-Appellee

Appeal from the District Court of Weld County
Honorable Robert A. Behrman, Judge
No. 88CV940

Division I JUDGMENT AFFIRMED
Opinion by JUDGE PIERCE
Sternber, C.J., and Marquez, J., concur

Welborn, Dufford, Brown & Tooley, P.C., Phillip D. Barber, Keith D. Tooley, Denver, Colorado, for Plaintiff-Appellee and Cross-Appellant

Hayes, Phillips & Maloney, P.C., Herbert C. Phillips, James S. Maloney, Denver, Colorado, for Defendant-Appellant and Cross-Appellee

Kathleen E. Haddock, Denver, Colorado, for Amicus Curiae Colorado Municipal League

Wayne D. Williams, Michael L. Walker, Denver, Colorado, for Amicus Curiae City and County of Denver by and through its Baord of Water Commissioners

Gale Norton, Attorney General, Raymond T. Slaughter, Chief Deputy Attorney General, Timothy M. Tymkovich, Solicitor General, Thomas W. Gibb, Assistant Attorney General, Denver, Colorado, for Amicus Curiae Colorado State Department of Highways

Defendant, City of Northglenn, appeals a judgment entered upon a jury verdict awarding plaintiff, Jack Grynberg, $646,930 as just compensation in his claim for inverse condemnation. The City also appeals the award of attorney fees and prejudgment interest to plaintiff. On cross-appeal, plaintiff appeals the sufficiency of the attorney fees and prejudgment interest awards. We affirm.

Plaintiff initially sought damages against the City and its contractors for geophysical trespass. This court affirmed the trial court's summary judgment. Grynberg v. City of Northglenn, 703 P.2d 601 (Colo. App. 1985). Our supreme court granted certiorari and reversed. Grynberg v. City of Northglenn, 739 P.2d 230 (Colo. 1987).

Plaintiff subsequently elected to proceed upon his claim of inverse condemnation, and the parties agree on appeal that the controlling facts are as set forth in the above supreme court decision. On October 26, 1988, venue was changed to Weld County to permit a trial before a jury of freeholders. See § 38-1-106, C.R.S. (1982 Repl. Vol. 16A).

I.

The City first contends that no evidence was presented to establish a taking of, or damage to, plaintiff's property, necessary to allow plaintiff to proceed on his inverse condemnation claim. We conclude that there was sufficient evidence of damage.

Citing Lipson v. Colorado Department of Highways, 41 Colo. App. 568, 588 P.2d 390 (1978), the City argues that there was no physical ouster and that, therefore, there was no interference with

plaintiff's right to explore the mineral estate. Further, the City argues that plaintiff maintained the right to mine the mineral estate despite its acquisition of the surface estate and planning of the reservoir. In any event, it points out that construction of the reservoir began after plaintiff assigned his coal lease.

Plaintiff points to three acts by the City which, he contends, support the trial court's finding of a taking of or damage to his property for which just compensation is owed. These acts are the acquisition by the City of the surface estate, the City's unauthorized entry and exploratory drilling on the mineral estate, and the publication of the Chen Report containing geophysical information about the mineral estate that belonged exclusively to plaintiff, which publication damaged the commercial value of his coal lease. We agree that plaintiff has established a damaging of his property for which he is entitled to just compensation.

Colo. Const. art. II, §15 provides that "[p]rivate property shall not be taken or damaged, for public use, without just compensation." To proceed on a claim of inverse condemnation, a plaintiff must show a taking of, or damage to, property for a public purpose without just compensation by a government or public entity which has the power of eminent domain but has refused to exercise it. The Mill v. State, 787 P.2d 176 (Colo. App. 1989), rev'd on other grounds, 809 P.2d 434 (Colo. 1991).

To establish compensable damage, plaintiff must show that he has some right or interest pertaining to the property which has been wholly or partially destroyed and that the damage affects the property or some right or interest which he, as owner, enjoys in connection with the property which is not shared by the public generally.

Harrison v. Denver City Tramway Co., 54 Colo. 593, 131 P. 409 (1913).

Such "damage" includes that which would result from the making of an improvement constructed without condemnation proceedings, and inverse condemnation proceedings are appropriate if condemnation proceedings are or might be necessary or proper, but have not been initiated. Board of County Commissioners v. Adler, 69 Colo. 290, 194 P. 621 (1920); see Kratzenstein v. Board of County Commissioners, 674 P.2d 1009 (Colo. App. 1983).

Thus, contrary to the City's assertion, physical ouster is not required in order for plaintiff to state a claim for relief in inverse condemnation proceedings. All plaintiff is required to show is a legal interference that substantially impairs his use or possession of the property, Board of County Commissioners v. Flickinger, 687 P.2d 975 (Colo. 1984); see Srb v. Board of County Commissioners, 43 Colo. App. 14, 601 P.2d 1082 (1979), or that interferes with his power of disposition over his property. Lipson v. Department of Highways, supra; 2 P. Rohan & M. Reskin, Nichols on Eminent Domain §6.20[1] (1990).

The facts here show that, in February 1978, the City drilled test holes on the mineral site without authorization from plaintiff or the State of Colorado. Further, the City's exploration and evaluation of the extent of coal deposits in this area were filed, as public information, in a report later determined to be erroneous. Since the report concluded that there was no economically recoverable coal on the site, its publication impaired plaintiff's ability to deal advantageously with his mineral rights under the lease. And, since plaintiff possessed exclusive rights to conduct geophysical operations

on the mineral estate, he was entitled to recover compensatory damages for the disregard of his property rights. See Grynberg v. City of Northglenn, supra.

In addition, there was testimony here that there could be no mining under the embankment of the reservoir and that mining under the reservoir itself would create additional safety hazards. Since a mineral estate is bound to support the surface estate, plaintiff was obligated to refrain from removing coal in a manner inconsistent with the support of the embankment or the surface estate. See William E. Russell Coal Co. v. Board of County Commissioners, 129 Colo. 330, 270 P.2d 772 (1954).

The issue of just compensation was, therefore, appropriately submitted to the jury for determination of the value of plaintiff's right to explore for and reduce to possession the minerals on his land. 2 P. Rohan & M. Reskin, Nichols on Eminent Domain §5.26[3] (1990).

II.

The City next contends that there was insufficient evidence to support the jury's verdict of $646,930. The City argues that, dependent as the verdict must be on the questionable testimony as to value given by a mining consultant, it must be set aside as improper and highly speculative. The City also contends that the verdict was tainted by improperly allowing the jury to consider evidence of the taking or damage to plaintiff's property, which is extraneous to the determination of just compensation. We disagree.

On review, if the jury was properly instructed, had the opportunity to observe the demeanor and credibility of the witnesses, and arrived at an award within the scope of the evidence, we will not reweigh the evidence, but will accept the jury's findings and award. State Department of Highways v. Mahaffey, 697 P.2d 773 (Colo. App. 1984).

The jury heard several experts testify as to the value of the mineral estate in 1978. All agreed that the coal market was at its peak at that time. Plaintiff and another mining and engineering expert opined that the coal in this area averaged 9500 to 9700 BTU, that the bulk of the area was commercial and had six feet or more coal, and that analysis of the recoverability of resources prior to drilling for the Chen report indicated a presence of 4.4 million tons of coal, which made this area an excellent potential coal source in 1978. This expert also testified that the value of plaintiff's interest was negatively impacted because of the prohibition of mining under a reservoir embankment, safety concerns inherent in mining under a reservoir itself, and the publication of the erroneous Chen data. As such, he opined that plaintiff's mineral rights under the coal lease would no longer yield a willing buyer.

The mining consultant testified that 9700 BTU coal would yield $16.97/ton in 1977 and 1978. Given the presence of 4.4 million tons of coal, this expert's personal appraisal of the value of the exploration rights to plaintiff's property was $500,000 to $750,000. He opined that a willing buyer would have paid approximately $4.3 million for plaintiff's property prior to the taking and damage by the City.

Finally, plaintiff presented testimony from a "landman" experienced in negotiating the sale of coal rights in the Boulder/Weld coal field in 1977. He testified that the sale of a comparable property with 4.4 million tons coal at 8000 BTU sold, at that time, for $800,000.

Thus, plaintiff presented evidence as to the value of his coal reserves in 1977 and 1978 prior to the City's activities and showed what a willing purchaser would have paid for the property at the time it was damaged. This is a proper measure of damages. See Department of Highways v. Shulhoff, 167 Colo. 72, 445 P.2d 402 (1968); Union Exploration Co. v. Moffat Tunnel Improvement District, 104 Colo. 109, 89 P.2d 257 (1939).

The City does not question the propriety of the jury instructions. Nor does it refute the fact that the jury was instructed independently to determine the credibility of each witness in weighing the testimony before it.

The jury heard evidence as to the City's actions and the contents of the relevant engineering reports, as this information pertained to the change in value of plaintiff's property rights under the coal lease. The record reveals that the trial court limited evidence of just compensation to exclude periods subsequent to the construction of the reservoir and the assignment by plaintiff of his lease. Thus, while the jury obviously heard testimony as to how the City came to damage plaintiff's property in the first place, the nature and effect of the damage was necessary to a determination of just compensation owing as a result of the damage. The jury's determination of compensation was, therefore, within the scope of the evidence properly before it. See Department of Highways v. Mahaffey, supra.

III.
A.

Finally, the City contends that attorney fees and prejudgment interest were erroneously awarded. The City argues that any attorney fee award is dependent upon the application of §24-56-116, C.R.S. (1988 Repl. Vol. 10B), which allows attorney fees when the condemning authority has received federal funding. But, because the trial court found that federal funds were not awarded to the City until after the Chen report and plaintiff's assignment of the lease, it contends that the statute does not apply and plaintiff is not entitled to attorney fees as part of the judgment. The City also argues that since there was no order of immediate possession pursuant to §38-1-105(6)(a), C.R.S. (1982 Repl. Vol. 16A), as required under §38-1-116, C.R.S. 1990 Cum. Supp.), there is likewise no basis for an award of prejudgment interest. We disagree.

We conclude that attorney fees were appropriately awarded to plaintiff under the plain language of the statute. Specifically, the statute provides that a plaintiff in an inverse condemnation proceeding shall be awarded attorney fees when the proceedings are instituted because of the "alleged taking of his property for any program or project for which federal financial assistance will be available to pay all or any part of the costs of the program or project . . . ." Section 24-56-116 (emphasis added). Therefore, the fact that federal funding was not actually awarded to the City at the time of the actual damaging is not determinative of plaintiff's entitlement to attorney fees.

Further, the actions by Chen and other contractors in their investigation of plaintiff's property, as well as the actual construction

of the reservoir, were part of the overall program or project for which federal financial assistance would become available. Plaintiff is, under these facts, entitled to attorney fees under the statute. See Hayden v. Board of County Commissioners, 41 Colo. App. 102, 580 P.2d 830 (1978).

The trial court likewise properly determined plaintiff's entitlement to an award of prejudgment interest. See §38-1-116.

B.

On cross-appeal, plaintiff argues that the trial court's denial of prejudgment interest from March 3, 1980, to the date of the change of venue to Weld County, on October 26, 1988, was arbitrary and erroneous, and the award should be calculated to include the entire period rom the date of possession or interference by the City until the jury ver(ict on November 13, 1989. We disagree.

Although plaintiff's claims in inverse condemnation followed the appeal from summary judgment on plaintiff's initial claims in tort, the trial court was correct in concluding that §38-1-116 precluded an award of prejudgment interest prior to the date the inverse condemnation claim was transferred to its proper venue. Specifically, the delay during this time was the result of plaintiff's prosecution and appeal of claims other than inverse condemnation. And, plaintiff could not have obtained any just compensation prior to correctly bringing such action in the proper venue. See §38-1-106, C.R.S. (1982 Repl. Vol. 16A); State Department of Highways v. Ogden, 638 P.2d 832 (Colo. App. 1981).

Finally, the trial court did not abuse its discretion in finding that the majority of fees incurred by plaintiff prior to the October 26 transfer pertained to his pursuit of claims other than inverse condemnation. See §24-56-116 (plaintiff is entitled to such attorney fees as, in the opinion of the court, will reimburse him for costs actually incurred because of the inverse condemnation proceedings).

Judgment affirmed.

CHIEF JUDGE STERNBERG and JUDGE MARQUEZ concur.

DISTRICT COURT, WELD COUNTY, COLORADO

Civil Action No. 88 CV 940, Division I

ORDER AND JUDGMENT

JACK J. GRYNBERG,

Plaintiff,

v.

CITY OF NORTHGLENN, an Incorporated Municipality of the State of Colorado,

Defendant.

On January 5, 1990, and April 13, 1990 the Court held its hearings on the following motions:

1. Defendant City of Northglenn's Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for New Trial;

2. Plaintiff Jack J. Grynberg's Bill of Costs;

3. Plaintiff Jack J. Grynberg's Motion for Determination of Prejudgment Interest; and

4. Defendant's Objections to Proposed Order and Judgment (and supplement thereto).

Based upon the submissions of the parties, the argument and stipulation of counsel, and upon evidence presented at the January 5, 1990 hearing, the Court rules as follows:

Defendant City of Northglenn's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, Motion for New Trial, is denied.

The parties have stipulated and the Court finds that the City of Northglenn received a grant of federal funds in the amount of $7,615,000 in September of 1980 for the construction of a wastewater treatment facility on Section 36, Township 1 North, Range 68 West, Weld County, Colorado. This grant of federal funds was awarded over two years after the publication of the Chen report and six months after plaintiff Grynberg assigned away his coal lease to Section 36. The Court finds that Grynberg is entitled, as part of his judgment, to his reasonable costs, disbursements and expenses, including reasonable attorneys' fees, expert witness, engineering and appraisal fees and costs pursuant to Section 24-56-116, 10B C.R.S. (1988 Repl. Vol.), as follows:

a. Docket and Filing Fees pursuant to C.R.S. 13-32-101 et. seq.

Denver District Court	$ 41.00
Colorado Court of Appeals	150.00
Transfer fee to Colorado	

	Court of Appeals	2.00
	Writ of Certiorari fee	150.00
b.	Jury fee pursuant to C.R.S. 13-70-103	50.00
c.	Service of witness subpoenas	326.30
d.	Attorneys' fees pursuant to C.R.S. 24-56-116	115,862.55
e.	Engineering and appraisal experts' fees, costs and disbursements pursuant to C.R.S. 24-56-116	
	(1) Niles Grosvenor	29,921.34
	(2) Ira McKeever	8,387.64
TOTAL FEES, COSTS, AND DISBURSEMENTS		$154,890.83

The Court holds that the date of the taking was March 3, 1980. This case was transferred from Denver District Court to this Court on October 26, 1988. With respect to Plaintiff's Motion for Determination of Prejudgment Interest, the Court holds that plaintiff is entitled to prejudgment interest only on the amount awarded by the jury, and only from the date this case was transferred to this Court, October 26, 1988, to the date of this Order. Plaintiff's request for prejudgment interest from March 3, 1980 through October 26, 1988 is denied pursuant to the last sentence of Section 38-1-116, 16A C.R.S. (1989 Cum. Supp.). Prejudgment interest is awarded at the rate prescribed by Section 38-1-116, 16A C.R.S. (1989 Cum. Supp.)

and as certified by the Colorado Secretary of State pursuant to Section 5-12-106(2), 2 C.R.S. (1989 Cum. Supp.). The applicable rates of interest are 8% per annum, compounded annually, for the calendar year 1988, and 9% per annum, compounded annually, for 1989 and 1990. Judgment, including prejudgment interest is, therefore, awarded in the amounts set forth below:

Jury Verdict	$646,930.00
Interest on verdict from October 26, 1988 to November 13, 1989	$ 60,334.22
Costs, disbursements, engineering and attorneys' fees	$154,890.83
TOTAL	$862,155.05

The Court denies plaintiff's request for prejudgment interest on the award for his costs, disbursements, engineering and attorneys' fees.

IT IS ORDERED, ADJUDGED and DECREED that Plaintiff have judgment against the Defendant for Eight Hundred Sixty-Two Thousand One Hundred Fifty-Five Dollars and Five Cents ($862,155.05), and judgment shall enter in that amount.

The Court grants to Defendant City of Northglenn a 45-day stay of execution from the date of entry of this Order and Judgment. This Order and Judgment shall be a final and appealable judgment,

from and after the date actually signed, in accordance with C.R.C.P. 54.

Entered this 20th day of April, 1990, nunc pro tunc, November 13, 1989.

BY THE COURT:

Robert A. Behrman
District Judge

APPROVED AS TO FORM:

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Supreme Court, U.S.
FILED
JUN 10 1993
OFFICE OF THE CLERK

No. 92-1820

In The

Supreme Court of the United States

October Term, 1992

JACK J. GRYNBERG,

Petitioner,

vs.

CITY OF NORTHGLENN, COLORADO,

Respondent.

On Petition For Writ Of Certiorari To The Colorado Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

1. Nature of the Case 1

2. The Course of Proceedings 2

3. Statement of the Facts 6

REASONS WHY THE PETITION SHOULD BE DENIED 9

1. The decision of the Colorado Supreme Court turned on issues of state, not federal, law 9

2. The decision of the Colorado Supreme Court in this case was entirely consistent with the recent "takings" decisions of this Court 15

3. The criteria for granting certiorari, as set forth in Rule 10.1, have not been met 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) 18

City of Northglenn, Colorado v. Grynberg, 846 P.2d 175 (Colo. 1993) ..... *passim*

Grynberg v. City of Northglenn, 703 P.2d 601 (Colo. App. 1985) 3, 4, 6, 8, 10

Grynberg v. City of Northglenn, 739 P.2d 230 (Colo. 1987) ..... *passim*

Grynberg v. City of Northglenn, 829 P.2d 473 (Colo. App. 1991) 11

Hendler v. United States, 952 F.2d 1364 (Fed. Cir. 1991) 19

Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981) 18

In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955) 12

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) 18

Lucas v. South Carolina Coastal Council, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) 10, 13, 15, 16, 20

Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) 17

Paterno v. Lyons, 334 U.S. 314, 68 S.Ct. 1044, 92 L.Ed. 1409 (1948) 12

TABLE OF AUTHORITIES – Continued

Page

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922) 18

Schuylkill Trust Co. v. Commonwealth of Pennsylvania, 302 U.S. 506, 58 S.Ct. 295, 82 L.Ed. 392 (1938) 12

Whitney Benefits, Inc. v. United States, 926 F.2d 1169 (Fed. Cir. 1991) 19

Yee v. City of Escondido, ___ U.S. ___, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) 16

CONSTITUTION

United States Constitution Amendment V . 6, 11, 12, 18

United States Constitution Amendment XIV 6

STATUTES

Colo. Const. art. II, § 15 .....5, 11

Colo. Rev. Stat. § 24-10-101 to 120 (1988 Repl. Vol.) . . .2, 4

Colo. Rev. Stat. § 34-1-303 (1984 Repl. Vol.) 7

Colo. Rev. Stat. § 34-1-305 (1984 Repl. Vol.) 7

Colo. Rev. Stat. § 37-87-105 (1990 Repl. Vol.) 7

Colo. Rev. Stat. § 37-87-117 (1990 Repl. Vol.) 7

Colo. Rev. Stat. § 38-35-109(1) (1982) 3

MISCELLANEOUS

2A *Nichols on Eminent Domain* § 6.26 (1990) 11

Justice Brennan, *State Court Decisions and the Supreme Court*, 31 Penn. Bar. Assn. Q. 393, 399-400 (1960) 13

No. 92-1820

In The

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On Petition For Writ Of Certiorari
To The Colorado Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petition presents no issue that warrants this Court's consideration and accordingly should be denied. The Colorado Supreme Court's opinion for which review is sought is reported at 846 P.2d 175 (Colo. 1993).

STATEMENT OF THE CASE

1. Nature of the Case.

Petitioner Jack J. Grynberg ("Grynberg") seeks review on certiorari of the decision of the Colorado Supreme Court in the case of *City of Northglenn, Colorado v. Grynberg*, 846 P.2d 175 (Colo. 1993) (hereafter "*Grynberg*

II"), in which the Colorado Supreme Court held that a coal lease owned by Grynberg had not been "taken or damaged" within the meaning of Article II, Section 15 of the Colorado Constitution. Respondent City of Northglenn, Colorado ("Northglenn") respectfully disagrees with Grynberg's characterization of this case as "an inverse condemnation case." *Pet. for Writ of Cert.* at 3. In fact, as the Colorado Supreme Court implicitly held, this is a state law tort claim, sounding in trespass, masquerading as a "takings" claim in order to avoid the effect of Colorado's Governmental Immunity Act. Colo. Rev. Stat. §§ 24-10-101 to 120 (1988 Repl. Vol.).

2. The Course of Proceedings.

Grynberg initially brought suit against Northglenn and several private contractors in 1978 in the District Court in and for the City and County of Denver. This suit was "based on theories of trespass, assumpsit, wrongful appropriation of geologic information, interference with prospective business advantage and negligence." *Grynberg v. City of Northglenn*, 739 P.2d 230, 233 (Colo. 1987) (hereinafter "*Grynberg I*"). "The asserted injury that provide[d] the principal basis for all of these claims, directly or indirectly, [was] the loss of market value of Grynberg's coal lease as the result of the discovery and publication of information that the coal reserves on the property have no commercial value." *Id.*

The district court dismissed Grynberg's complaint on summary judgment holding that Grynberg's failure to record the coal lease, which he had acquired from the State of Colorado, rendered the lease ineffective as to the

defendants. The Colorado Court of Appeals affirmed. *Grynberg v. City of Northglenn*, 703 P.2d 601 (Colo. App. 1985). The Colorado Supreme Court reversed, holding that: (i) the Colorado Recording Act, Colo. Rev. Stat. § 38-35-109(1) (1982), did not protect the defendants; (ii) the permission obtained by Northglenn from the owner of the surface estate was insufficient to authorize Northglenn to drill in search of mineral deposits; and (iii) the tort of geophysical trespass would be recognized in Colorado. The Court then remanded the case to the trial court, specifically stating as follows:

> We hold that the trial court erred in granting summary judgment for the defendants. Grynberg invites us to go on to direct that summary judgment be entered in his favor determining that liability has been established with respect to the claims embraced in his motion for partial summary judgment. We decline this invitation. The trial court has not had an opportunity to delineate the elements of each of Grynberg's claims for relief or the extent to which factual issues relevant to those elements might remain unresolved. The possibility of the existence of affirmative defenses, such as governmental immunity, also remains unexplored. Additionally, our grant of certiorari was not sufficiently expansive to permit full consideration of all of Grynberg's claims for relief. Under these circumstances, we are persuaded that the interests of justice will be best served by returning this matter to the trial court for definition and resolution of all issues remaining

> unresolved as a result of our reversal of the summary judgments for the defendants.

Grynberg I, 739 P.2d at 239.[1]

Upon remand, Northglenn again moved for summary judgment in its favor dismissing all of the tort claims brought by Grynberg pursuant to the Colorado Governmental Immunity Act, Colo. Rev. Stat. § 24-10-101 to 120 (1988 Repl. Vol.) (the "GIA"). The trial court granted this motion and further dismissed all claims against the other Defendants to the extent that their actions were not independently tortious. Grynberg thereupon made his election of remedies voluntarily abandoning his tort claims, including any claim based on the tort of "geophysical trespass" recognized by the Colorado Supreme Court in *Grynberg I*, and proceeded on a theory of inverse condemnation.

Trial was held and the jury returned a verdict in favor of Grynberg of $646,930 to which the trial court added costs, attorney fees and interest for a total of $862,155.05. Northglenn appealed to the Colorado Court of Appeals, arguing that the trial court had erred in: (i) finding a "taking" of private property within the meaning of Article II, Section 15 of the Colorado Constitution; (ii) holding the evidence presented to the jury sufficient

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[1] The express terms of the Court's remand are important because Grynberg has repeatedly represented or implied both to the trial court, to the Colorado Court of Appeals, the Colorado Supreme Court, and now to this Court that the Court in *Grynberg I* found a "taking" within the meaning of Colorado's "Just Compensation Clause." Justice Erickson of the Colorado Supreme Court, in his special concurrence in *Grynberg II*, stated on this point that "Grynberg mischaracterizes our holding in *Grynberg I*." 846 P.2d at 188.

in law and fact to support the verdict; (iii) admitting evidence bearing on issues other than just compensation; and (iv) awarding Grynberg interest and attorney fees.

Grynberg cross-appealed arguing that the trial court erred in: (i) denying Grynberg pre-judgment interest during the period prior to the transfer of the case to Weld County District Court; and (ii) not awarding Grynberg the full amount of attorney fees requested.

The Colorado Court of Appeals affirmed the trial court in all respects. *Grynberg v. City of Northglenn*, 829 P.2d 473 (Colo. App. 1991).

Northglenn petitioned the Colorado Supreme Court for certiorari and Grynberg filed a cross-petition. The Colorado Supreme Court granted certiorari on three issues. The precise phrasing of the issues considered by the Colorado Supreme Court is important since it bears heavily on the propriety of granting certiorari in this Court.

> We granted Northglenn's petition for writ of certiorari on two issues: (1) whether the court of appeals erred in holding that the inability to mine under the reservoir and its embankment, the drilling of test holes, and the filing of a report *constitute a taking within the meaning of Article II, Section 15 of the Colorado Constitution;* and (2) whether the court of appeals erred in finding the evidence presented at trial was sufficient in law and fact to support the jury's verdict. We also granted Grynberg's cross-petition for writ of certiorari on the issue of *whether Article II, Sections 15 and 25, of the Colorado Constitution require* that the prejudgment interest awarded to Grynberg on his inverse condemnation judgment be calculated from the date of the

> taking of his property by the City of Northglenn. Because we conclude that there was no constitutional taking or damaging, we reverse on the first issue and do not address the other two issues.

Grynberg II, 846 P.2d at 177-178 (emphasis added). Reference to Amendments V and XIV of the United States Constitution is conspicuous by its absence for reasons which will be addressed more fully below.

A unanimous Colorado Supreme Court, with two of the seven justices specially concurring, held as follows:

> We conclude that Grynberg did not prove a taking or damaging of his property pursuant to Article II, Section 14 of the Colorado Constitution, by Northglenn's acquisition of the surface estate, the drilling, or the publication of the Chen report. Because there was no taking or damaging of Grynberg's property, we reverse the judgment of the court of appeals and remand the case with directions to return the case to the district court for the dismissal of Grynberg's inverse condemnation action.

846 P.2d at 185.

3. Statement of the Facts.

Most of the facts pertinent to this case are undisputed and are set forth in the opinions of the Colorado Supreme Court in *Grynberg I* and *Grynberg II* and need not be repeated here. Certain inaccuracies in the recitation of facts contained in Grynberg's Petition for Writ of Certiorari must, however, be corrected.

In late 1977, Northglenn began a search for potential sites for a wastewater treatment facility and associated reservoir to serve Northglenn's 30,000 residents with sewage treatment services. One of the sites considered was located on the West half of Section 36, Township 1 North, Range 68 West of the 6th P.M., in Weld County, Colorado (the "Site"). Under pertinent state statutes Northglenn was required, prior to construction of the reservoir, to determine whether the site contained commercial deposits of minerals.[2]

In order to ascertain the ownership of the Site, Northglenn searched the Weld County records and learned that the severed mineral estate to Section 36, Township 1 North, Range 68 West of the 6th P.M. ("Section 36"), including the Site, was owned by the State of Colorado. Northglenn also learned that the State had issued a coal lease for Section 36 to the Clayton Coal Company which had assigned the lease to Adolph Coors Company which "had determined that any coal within the leasehold boundaries was not economically recoverable, and that Coors therefore had abandoned the coal lease." *Grynberg I*, 739 P.2d at 232.

What Northglenn did not learn, due to Grynberg's failure to record any evidence of his interest in Section 36,

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[2] *See* Colo. Rev. Stat. §§ 34-1-303, -305(1) and (2) (1984 Repl. Vol.) (prohibiting governmental zoning authorities in populous counties from permitting use of any area containing a commercial mineral deposit in a manner that would interfere with extraction of such deposit); Colo. Rev. Stat. §§ 37-87-105(1) and -117 (1990 Repl. Vol.) (requiring state engineer's approval of engineering data and plans before certain dams may be constructed).

was that in July of 1977, Grynberg had "leased the right to explore for coal in Section 36 (640 acres of land) for $640 per year from the State of Colorado." *Grynberg II*, 846 P.2d at 178.

With the permission of the owner of the surface estate, Northglenn's independent contractors conducted the drilling required by state law and, based on the results, filed in the office of Colorado's State Engineer what has been referred to as the "Chen Report" which concluded that " 'it is our opinion that the coal in Section 36 . . . does not represent a potentially recoverable resource.' " *Grynberg I*, 739 P.2d at 233.

Grynberg states that following the filing of the Chen Report "Northglenn then purchased the surface overlying Grynberg's lease and began planning and construction of its reservoir." *Pet. for Writ of Cert.* at 5. In actuality Northglenn, on June 1, 1978, purchased only 320 acres (the West half of Section 36) of the 640 acres subject to Grynberg's coal lease and the proposed reservoir was to occupy only about a quarter of Section 36.

Moreover, Grynberg neglects to advise the Court of several other critical facts, the most important of which is that "[b]y the time Northglenn began site preparation for the reservoir, Grynberg had conveyed the mineral lease to his wife who is not a party to this action." *Grynberg II*, 846 P.2d at 181. As the Colorado Supreme Court observed:

> Northglenn's acquisition of the surface estate had absolutely no effect on Grynberg's property rights as lessee of the mineral estate because Grynberg was not prevented from exploring or mining coal lying under the proposed site of the reservoir. The surface estate was cultivated

> farmland both before and after it was purchased by Northglenn.

Id. This is not, as Grynberg intimates, a case where a city has constructed a reservoir and effectively precluded subsurface mining. During the entire term of his lease Grynberg was legally entitled and physically able to mine coal anywhere under Section 36 but chose not to do so. The construction of a reservoir on a portion of Section 36 after he conveyed away his coal lease is, as the Colorado Supreme Court concluded, irrelevant.

Finally, Grynberg suggests in his Petition for Writ of Certiorari that Northglenn "destroyed the value of Grynberg's property rights." *Pet. for Writ of Cert.* at 9. The record below contains no such finding nor can such a finding be inferred since the amount of coal under Section 36 never changed and Grynberg was, indisputably, legally and physically able to explore and mine the coal at any time during the term of his leasehold. Indeed the jury in this case was instructed to determine "the amount of the *reduction in value,* if any, of Mr. Grynberg's coal lease as a result of the actions of the city alleged in this case." Jury Instruction No. 10 (emphasis added). This instruction is, of course, inconsistent with Grynberg's representation that his lease had been rendered entirely valueless. This point will be discussed in greater detail below.

REASONS WHY THE PETITION SHOULD BE DENIED

Grynberg's Petition for Writ of Certiorari should be denied because: (i) the decision of the Colorado Supreme

Court turned on issues of state, not federal, law; (ii) the decision of the Colorado Supreme Court is entirely consistent with the recent "takings" decisions of this Court; and (iii) the criteria for granting certiorari, as set forth in Rule 10.1, have not been met. Each of these reasons will be separately addressed.

1. The decision of the Colorado Supreme Court turned on issues of state, not federal, law.

Reduced to its essence, the Colorado Supreme Court's decision in *Grynberg II* holds that Grynberg's remedy, if any, lies in the tort of geophysical trespass first recognized in Colorado in *Grynberg I*,[3] and that Grynberg's coal lease was not "taken or damaged" within the meaning of Article II, Section 15 of the Colorado Constitution. These are, of course, matters of state law.

Significantly, not once during the briefing in the Colorado Supreme Court did Grynberg cite to this Court's decision in *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). Yet he now complains that "while that decision [*Grynberg II*] gives lip service to *Lucas*, the practical reality of the ruling is that the Colorado Supreme Court has ignored it completely." *Pet. for Writ of Cert.* at 20.

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[3] "In *Grynberg I*, we merely held that a geophysical trespass was actionable. *Grynberg I*, 739 P.2d at 239. The proper claim for the invasion of the property interest and the publication of the information does not lie in inverse condemnation, but rather should be brought in trespass or another action in tort." *Grynberg II*, 846 P.2d at 188 n. 6 (Erickson, J., specially concurring).

Similarly, Grynberg cited to Amendment V only twice (once in a parenthetical and once in relation to his request for prejudgment interest) in his Opening Brief in the Colorado Supreme Court and not at all in his Reply Brief. Yet he now suggests that this Court should grant certiorari because "[t]he decision of the Colorado Supreme Court is a decision on an important issue of federal law. . . . " *Id.* at 14.

Quite simply, from trial onward, the parties to this case recognized that no traditional "taking" had occurred in this case pursuant to Amendment V and that this case turned on the fact that the Colorado Constitution requires just compensation where private property is "taken *or damaged*" for public use. Art. II, Sec. 15, Colo. Const. (emphasis added).[4] The "or damaged" clause of Article II, Section 15 was clearly the rationale for the Court of Appeals' decision in *Grynberg v. City of Northglenn*, 829 P.2d 473 (Colo. App. 1991)[5] which explains why the Colorado Supreme Court, in granting certiorari, limited its

---

[4] Colorado's "just compensation" clause, requiring compensation where private property is "damaged" for public use is modeled after a similar provision in the Constitution of Illinois and is now contained in the constitutions of some 25 states. 2A *Nichols on Eminent Domain* § 6.26 (1990).

[5] The Colorado Court of Appeals explained its decision thusly:

> Colo. Const. art. II, § 15 provides that '[p]rivate property shall not be taken *or damaged*, for public or private use, without just compensation.' To proceed on a claim of inverse condemnation, a plaintiff must show a taking of, or damage to, property for a public purpose without just compensation by a government or public entity which has the power of eminent domain but has refused to exercise it.
>
> * * *

writ to consideration of Article II, Section 15. This is why the Colorado Supreme Court devoted considerable discussion to the distinction between Colorado's just compensation clause and traditional "takings" clauses, explaining that "[i]t has been said that by including damaging in the just compensation provision, the Colorado Constitution affords an aggrieved property owner a greater measure of protection than does the Constitution of the United States." *Grynberg II*, 846 P.2d at 179.

Thus, the decisions below turned entirely on issues of state law and, specifically, on the meaning of the "or damaged" provision of Article II, Section 15 of the Colorado Constitution. This Court has consistently held that a state supreme court is the ultimate tribunal in construing the meaning of a state constitution and that this Court cannot, and will not, review a decision of a state court with respect to a question arising under the state constitution. *See In re Murchison*, 349 U.S. 133, 135, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955) (Michigan Supreme Court's interpretation of Michigan Constitution binding on United States Supreme Court); *Paterno v. Lyons*, 334 U.S. 314, 319 68 S.Ct. 1044, 1046, 92 L.Ed. 1409, 1414 (1948); *Schuylkill Trust Co. v. Commonwealth of Pennsylvania*, 302 U.S. 506, 512, 58 S.Ct. 295, 298, 82 L.Ed. 392, 396 (1938).

> Thus, contrary to the City's assertion, physical ouster is not required in order for plaintiff to state a claim for relief in inverse condemnation proceedings. All plaintiff is required to show is a legal interference that substantially impairs his use or possession of the property. . . .

829 P.2d at 475 (citations omitted).

The considerations governing the review of state court decisions by this court have been summarized by Justice Brennan as follows:

> Crucial to the exercise of our certiorari jurisdiction is whether the controlling issue in the state court is a federal issue, that is, an issue arising under the United States Constitution or under federal laws or treaties. But the fact that a federal question lurks in the case doesn't mean, standing alone, that a state decision will be reviewed. *First*, the federal question must be a substantial question. *Second*, the federal question must have been properly raised in the state courts. This is required because the state courts must first be afforded an opportunity to consider and decide the federal question. *Third*, even then we may not take the case if the state court's judgment can be sustained on an independent ground of state law.

Justice Brennan, *State Court Decisions and the Supreme Court*, 31 Penn. Bar. Assn. Q. 393, 399-400 (1960).

Here, any federal question under Amendment V was insubstantial and clearly ancillary to the analysis of the "or damaging" provision of the Colorado Constitution. The federal question was not properly raised in the state court. Indeed Grynberg never even cited to the Colorado Supreme Court the *Lucas* case which he now claims requires reversal of its decision. *Lucas*, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

Finally, and perhaps most importantly, the state court's judgment can be sustained on an independent ground of state law, as the Colorado Supreme Court specifically noted:

> Even if we did conclude that the acquisition of the surface brought about a taking (or damaging) of Grynberg's coal lease to the extent that it was forced to support a reservoir, we could not affirm the trial court's judgment. There was no evidence before the jury as to how much coal from a hypothetical mining operation under section 36 would be required to remain in place to support a reservoir as then proposed by Northglenn; the jury's valuation, to the extent the acquisition of the surface allegedly was a taking, was purely speculative.

Grynberg II, 846 P.2d at 181 n. 7. Since the state supreme court has already stated that reversal was required as a matter of state law, any consideration by this Court of the ancillary federal question is an exercise in futility since it will not change the result.

Reading Grynberg's Petition, it becomes clear that his primary contention is that the Colorado Supreme Court failed to understand the *facts* of this case.[6] Northglenn disagrees. The point, however, is that this Court should only grant certiorari where a state court of last resort has misconstrued the Constitution or federal law, not the facts of the case.

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[6] Some sample quotations including the following: "In order to justify its ruling the Colorado Supreme Court attempted to rewrite the actual evidence presented at trial." *Pet. for Writ of Cert.* at 17. "This holding was completely at odds with the proof at trial. . . . " *Id.* "Nor was there any factual predicate for the Colorado Supreme Court's conclusion. . . . " *Id.* The "opinion is rife with unsubstantiated factual determinations and findings which are inconsistent with the facts as outlined in *Grynberg I*. . . . "*Id.* at n. 5. "This remarkable misstatement is confounding. . . . " *Id.* at 18.

This case was briefed, argued and decided as a state law case. Even if "a federal question lurks in the case," it does not warrant an exercise of certiorari jurisdiction by this Court.

2. The decision of the Colorado Supreme Court in this case was entirely consistent with the recent "takings" decisions of this Court.

Grynberg asks this Court to grant his Petition for Writ of Certiorari on two bases:

> This Court should accept Grynberg's petition for two important reasons. First, this case gives the Court an opportunity to explain how its decision in *Lucas* would apply to a physical taking of mineral property rights. Secondly, the decision of the Colorado Supreme Court must be reversed because, while that decision gives lip service to *Lucas*, the practical reality of the ruling is that the Colorado Supreme Court has ignored it completely. Even though Grynberg has suffered "the loss of all economically beneficial productive use of [his] land", Grynberg receives no compensation whatsoever.

Pet. for Writ of Cert. at 20. Grynberg's reliance on *Lucas* is misplaced for several reasons.

First, *Lucas* was a regulatory taking case, but here Northglenn passed no laws or regulations limiting or restricting Grynberg's use of his coal lease. Indeed Section 36 was, at all relevant times, part of unincorporated Weld County. It was not part of Northglenn, nor was it

subject to its regulatory authority. Thus, Grynberg's contention must, if anything, be that Northglenn's preconstruction planning activities relating to the Site constituted a physical taking governed by such cases as this Court's recent decision in *Yee v. City of Escondido, California*, ___ U.S. ___, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992). In *Yee*, this Court held that "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." 112 S.Ct. at 1528 (emphasis in original).

Under the undisputed facts of this case, Northglenn never occupied Grynberg's coal lease at all.

> From the time that Grynberg obtained the coal lease until the time that he conveyed the coal lease to his wife, the surface was used as agricultural land. Northglenn did nothing which would have impaired Grynberg's exploration for or mining of coal in the coal lease.

Grynberg II, 846 P.2d at 185. Thus, there was no physical taking.

Second, even if the *Lucas* decision regarding regulatory takings was applicable to a purported physical taking, the *Lucas* decision was specifically premised on the undisputed fact that Lucas' property had been "rendered valueless." 112 S.Ct. at 2896. This fact brought the *Lucas* case squarely within this Court's "frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." 112 S.Ct. at 2895 (emphasis in original).

By contrast, in this case there has never been a determination that Northglenn somehow deprived Grynberg of all economically beneficial use of his coal lease. Far from it. Whatever coal is in Section 36 remains there and Grynberg could have mined it at any time during the term of his leasehold. The Chen Report merely confirmed publicly available information regarding the limited amount of coal underlying Section 36.[7] As the Colorado Supreme Court held:

> [W]e determine that Grynberg has not made out a case showing a constitutional damaging of his property. While it does appear that his coal lease was diminished in value, this is not sufficient.

Grynberg II, 846 P.2d at 184-185. This conclusion is entirely consistent with this Court's ruling in *Lucas* and with the takings decisions of this Court requiring compensation only where government regulation denies all economically beneficial or productive uses of land. *See e.g. Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834,

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[7] After summarizing the evidence on this point, the Colorado Supreme Court stated as follows:

> Thus, the conclusion reached by the Chen report that coal mining under Section 36 was not commercially feasible was not based on proprietary or secret information gained as a result of the exploratory hole drilled by Chen in Section 36. The same basic information was contained in the Bureau of Mines report, as well as the USGS and Coors drilling logs, and Grynberg has failed to prove that the Chen report infringed on a trade secret or on otherwise exclusive proprietary information.

Grynberg II, 846 P.2d at 184.

107 S.Ct. 3141, 3147, 97 L.Ed.2d 677 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495, 107 S.Ct. 1232, 1247, 94 L.Ed.2d 472 (1987);[8] *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295-296, 101 S.Ct. 2352, 2370, 69 L.Ed.2d 1 (1981); *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980).

Applying the takings jurisprudence of this Court to the facts of this case as set forth in *Grynberg I* and *Grynberg II* it is clear that the decision of the Colorado Supreme Court is entirely consistent with the decisions of this Court and that certiorari review is inappropriate.

3. The criteria for granting certiorari, as set forth in Rule 10.1, have not been met.

Grynberg's Petition for Writ of Certiorari falls within none of the considerations governing the granting of a writ of certiorari enunciated by this Court in Rule 10.

Rule 10.1(a) applies only to the United States courts of appeals and is not relevant here.

Rule 10.1(b) states that certiorari will be considered "[w]hen a state court of last resort has decided a federal

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[8] While Grynberg repeatedly cites Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), not once does he cite the much more recent and pertinent decision of this Court in *Keystone, supra*, holding that Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act, which required the petitioners to leave some 27 million tons of coal in place beneath certain public buildings, dwellings and cemeteries did not constitute a taking under Amendment V.

question in a way that conflicts with a decision of another state court of last resort or of a United States court of appeals." Grynberg has cited to no state court decisions which purportedly conflict with the Colorado Supreme Court's decision in *Grynberg II*. His suggestion that the *Grynberg II* decision is "at odds" with two federal cases is flatly incorrect.[9] *Pet. for Writ of Cert.* at 15.

This leaves the final consideration of whether the *Grynberg II* decision has "decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." Rule 10.1(c).

As discussed above, the Colorado Supreme Court's decision in *Grynberg II* did not "decide[] an important question of federal law" at all, turning as it did on questions of state law. Certainly it did not decide "any federal

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[9] *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir. 1991) was never cited by Grynberg in the Colorado Supreme Court briefing. The case involved a specific statutory prohibition which precluded surface mining of coal in alluvial valley floors and was "fact-specific." *Id.* 926 F.2d at 1171. Obviously, Northglenn never enacted any law or regulation prohibiting Grynberg from mining his coal since Section 36, located outside Northglenn's boundaries, was not within Northglenn's regulatory jurisdiction.

Hendler v. United States, 952 F.2d 1364 (Fed. Cir. 1991) involved physical occupation of and damage to the surface estate. There is no indication that the plaintiff in *Hendler* even owned the mineral estate. The Colorado Supreme Court correctly concluded that *Hendler* was not "on point." *Grynberg II*, 846 P.2d at 182 n. 9.

question in a way that that conflicts with applicable decisions of this Court." As discussed above, the Colorado Supreme Court specifically considered this Court's ruling in *Lucas* (despite Grynberg's failure to cite that decision even once), and its decision is entirely consistent with the takings jurisprudence of this Court.

Grynberg has met none of the Rule 10 conditions governing the granting of certiorari.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 92-1820

In The

Supreme Court of the United States

October Term, 1993

JACK J. GRYNBERG,

Petitioner,

vs.

CITY OF NORTHGLENN, COLORADO,

Respondent.

Petition For Writ Of Certiorari To The Colorado Supreme Court

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PARTIES TO THE PROCEEDING BEFORE THE SUPREME COURT, STATE OF COLORADO iv

ARGUMENT 2

I. THE DECISION OF THE COLORADO SUPREME COURT WAS BASED UPON ITS INTERPRETATION OF THE UNITED STATES AND COLORADO CONSTITUTIONS 2

II. NORTHGLENN'S DESCRIPTION OF THE "UNDISPUTED FACTS" IS COMPLETELY AT ODDS WITH THE RECORD BEFORE THE COURT 6

CONCLUSION 6

TABLE OF AUTHORITIES

Cases:

Air Pollution Variance Board v.
Western Alfalfa Corp.,
191 Colo. 455, 553 P.2d 811 (1976) 5

Board of County Comm'rs v. Flickinger,
687 P.2d 975, (Colo. 1984) 4

City & County of Denver v. Eggert,
647 P.2d 216, 222 (Colo. 1988) 4

City of Northglenn v. Grynberg,
846 P.2d 175 (Colo. 1993) . . . . . passim

Grynberg v. City of Northglenn,
829 P.2d 473 (Colo. App. 1991) 6

Keystone Bituminous Coal Ass'n v. DeBenedictis,
480 U.S. 470, 107 S. Ct. 1232,
94 L. Ed.2d 472 (1987) 3

Kirk v. Denver Publishing Company,
818 P.2d 262, (Colo. 1991) 5

Lucas v. South Carolina Costal Council,
___ U.S. ___, 112 S.Ct. 2886,
120 L.Ed.2d 798 (1992) 2, 3

Nollan v. California Coastal Comm'n,
483 U.S. 825, 107 S. Ct. 3141,
97 L. Ed.2d 677 (1987) 3

Pennsylvania Coal Company v. Mahon,
393 U.S. 415 (1922) 2, 3

Ruckelshaus v. Monsanto Co.,
467 U.S. 986, 104 S.Ct. 2862,
81 L.Ed.2d 815 (1984) 3, 4

Sellon v. City of Manitou Springs,
745 P.2d 229, (Colo. 1987) 5

VanSickle v. Boyes,
797 P.2d 1267 (Colo. 1990) 5

Constitution:

United States Constitution
Amendment V . . . . . passim

United States Constitution
Amendment XIV . . . . . passim

Colorado Constitution,
Article II Section 15 5

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Jack J. Grynberg ("Grynberg") submits this Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

ARGUMENT

I. THE DECISION OF THE COLORADO SUPREME COURT WAS BASED UPON ITS INTERPRETATION OF THE UNITED STATES AND COLORADO CONSTITUTIONS.

Northglenn argues that this Court should not grant Grynberg's Petition for Writ of Certiorari should be denied because Northglenn claims that the decision of the Colorado Supreme Court was based exclusively on "matters of state law." This superficial reading of the Colorado Supreme Court's decision in City of Northglenn, Colorado v. Grynberg, 846 P.2d 175 (Colo. 1993) ("Grynberg II") is belied by the opinion of the Colorado Supreme Court, id., and advances a proposition that is flatly at odds with that court's reliance on the United States Constitution and federal law to guide its decisions on inverse condemnation and eminent domain.

It would likely surprise the Colorado Supreme Court to learn that its decision was based solely on "matters of state law". If, as Northglenn claims, the decision of the Colorado Supreme Court has no basis in federal constitutional law, it would be logical that only Colorado case law would be cited to support the decision. To the contrary, however, the ruling in Grynberg II is grounded in decisions of this Court and in the Fifth and Fourteenth Amendments to the United States Constitution.

It is indeed telling that the first and primary authority cited by the Colorado Supreme Court to define when a "taking" occurs under Colorado law was the recent decision of this Court in Lucas v. South Carolina Costal Council, ___ U.S. ___, ___ 112 S. Ct. 2886, 2895 (1992): "[W]hen an owner is called upon to sacrifice all economically beneficial uses of real property to the common good, the owner has suffered a taking." Grynberg II, 846 P.2d at 178. Likewise, in analyzing "the scope of

constitutionally compensable damagings of property", the Colorado Supreme Court listed not a single Colorado precedent; but cited no fewer than three rulings of this Court. Grynberg II, 846 P.2d at 180, n. 5, citing Lucas v. South Carolina Coastal Council, supra; Nollan v. California Coastal Comm'n, 483 U.S. 825, 834, 107 S. Ct. 3141, 3147 97 L. Ed.2d 677 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495, 107 S. Ct. 1232, 1247, 94 L. Ed.2d 472 (1987).

Besides defining a "taking" by reference to this Court's interpretation of the United States Constitution, the Colorado Supreme Court relied upon yet another decision of this Court when it addressed Grynberg's contention that Northglenn had taken his property by the acquisition of the surface estate for its wastewater reservoir. Grynberg II, 846 P.2d at 180, n. 6, citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922). According to the Colorado Supreme Court, Pennsylvania Coal Co. is persuasive precedent contrary to Grynberg's position. Although Grynberg disagrees with the court's analysis and has explained in his Petition that the Colorado court's misinterpretation of Pennsylvania Coal Co. is but one of a number of instances where it failed to follow the rulings of this Court, it is nonetheless important that the Colorado Supreme Court rested its ruling on federal law, rather than on Colorado law. Petition at 15, 16, 19-20.

And, finally, when the Colorado Supreme Court decided that the unauthorized drilling on Grynberg's property and Northglenn's publication of confidential information did not infringe upon Grynberg's constitutionally protected property rights to trade secrets and proprietary data, the Colorado Supreme Court based its holding upon yet another decision of this Court and upon no Colorado authorities. Grynberg II, 846 P.2d at 182-83, citing Ruckelshaus v. Monsanto, 467 U.S. 986, 1001-04, 104 S. Ct. 2862, 2872-74, 81 L. Ed.2d 815 (1984). Although, the Colorado Supreme Court recognized that "trade

secrets [in Colorado] are property entitled to protection under the Fifth Amendment's Takings Clause," it held that Grynberg had failed to satisfy the elements needed to establish a claim under Ruckelshaus. Id. Thus, on the key subject of when a "taking" occurs and whether, under the facts of this case, Grynberg's property had been taken without just compensation, the Colorado Supreme Court relied upon federal cases and their interpretation of the United States Constitution at every turn.

The Colorado court's reliance upon federal law to decide Grynberg's constitutional claims was normal and customary. The Colorado Supreme Court has long recognized that the Takings Clause of the Colorado Constitution provides, at a minimum, the same due process guarantees that are afforded by the United States Constitution. Thus, the Colorado Supreme Court has consistently held that any consideration of just compensation is necessarily premised upon an analysis of both the Colorado Constitution and the United States Constitution. This fact is established by reference to a sampling of decisions from the Colorado Supreme Court, for example:

1. City & County of Denver v. Eggert, 647 P.2d 216, 222 (Colo. 1988) - "[T]he due process clause of the Colorado Constitution, Art. II, Sec. 25, 'requires at a minimum the same guaranties as those protected by the due process clause of the Federal Constitution under the fourteenth amendment.'"

2. Board of County Comm'rs v. Flickinger, 687 P.2d 975, 983 (Colo. 1984) - "In resolving the [defendants' due process] claim, we take guidance from the United States Supreme Court in construing the Fifth Amendment against governmental taking of private property without just compensation."

3. Kirk v. Denver Publishing Company, 818 P.2d 262, 267 (Colo. 1991) - "The Takings Clause of both the federal and state constitutions is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"

4. Air Pollution Variance Board v. Western Alfalfa Corp., 191 Colo. 453, 553 P.2d 811, 816 (1976) - The United States Constitution provides the minimum protection which must be observed when applying the laws of the State of Colorado.

See also, Sellon v. City of Manitou Springs, 745 P.2d 229, 232, n. 4 (Colo. 1987) (Fourteenth Amendment of the United States Constitution and Art. II, Sec. 25 of the Colorado Constitution provide the same due process protections); VanSickle v. Boyes, 797 P.2d 1267, 1271-72 (Colo. 1990) (analysis of taking made in light of Fifth Amendment of the United States Constitution and Art. II, Sec. 15 of the Colorado Constitution).

What resounds from a reading of the Colorado Supreme Court's holding in Grynberg II, and from an analysis of its prior decisions on due process and just compensation, is that these issues cannot be and are not analyzed without reference to the United States Constitution. Given the Colorado Supreme Court's repeated pronouncement that it is guided by the Fifth and Fourteenth Amendments of the United States Constitution, and with the ample evidence that in Grynberg II the Colorado Supreme Court was guided by decisions of this Court which interpret the United States Constitution, Northglenn's contention that the Grynberg II decision was based solely upon "matters of state law" rings hollow. And, although it may have cited federal law in support of its decision, the Colorado Supreme Court has taken license with the rulings of this Court to reach a tortured

and incorrect result. By granting Grynberg's Petition for Writ of Certiorari, the Court can set the record straight.

II. NORTHGLENN'S DESCRIPTION OF THE "UNDISPUTED FACTS" IS COMPLETELY AT ODDS WITH THE RECORD BEFORE THE COURT.

In order to bolster its contention that Grynberg suffered no damage as a result of Northglenn's conduct, Northglenn (and, ultimately the Colorado Supreme Court) create "facts" and call them "undisputed". Brief in Opposition at pp. 15-18. Although Northglenn contends that there was no physical occupation of Grynberg's land, the opposite conclusion was reached by the trial court and by the appellate court which actually studied the record of the trial, where it was determined that Northglenn had physically occupied Grynberg's property by conducting unauthorized drilling and exploration activities on it. See Grynberg v. City of Northglenn, 829 P.2d 473, 476 (Colo. App. 1991). Moreover, Northglenn's contention that "there has never been a determination that Northglenn somehow deprived Grynberg of all economically beneficial use of his coal lease" pales in the light of the evidence. At trial, Grynberg's witnesses "opined that plaintiff's mineral rights under the coal lease would no longer yield a willing buyer", and the jury returned a verdict of $646,930 based upon the complete loss of value for Grynberg's property rights. Id. Not only did the Colorado Supreme Court misapply federal law, it shaded the facts to justify a result which denies Grynberg just compensation for the taking of his property rights.

CONCLUSION

Grynberg was denied due process as a result of a ruling that misstates the facts in the case and misapplies applicable constitutional law. Grynberg respectfully requests that his Petition be granted to remedy this wrong.

Respectfully submitted,

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